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In the Supreme Court of the United States

OCTOBER TERM, 1989

NANCY ALLEVATO, as Personal Representative of the ESTATE OF MICHAEL J. FERRANTINO, SR., *et al.*,
Petitioners,

v.

THE COUNTY OF OAKLAND and THE COUNTY OF MACOMB,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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July 13, 1989

QUESTIONS PRESENTED

1. Whether a plaintiff suffers an injury in fact sufficient to confer standing pursuant to Article III of the United States Constitution from allegedly illegal overcharges billed to it, where the plaintiff is required by state law to pass on to its customers 100 percent of all charges billed to it, including all allegedly illegal overcharges, and is also prohibited by state law from deriving profits or excess revenues from the payments from its customers.

2. Whether an antitrust plaintiff lacks standing under section 4 of the Clayton Act, pursuant to the "cost-plus" exception to the rule in *Hanover Shoe* and *Illinois Brick*, where the plaintiff is required by state law to pass on to its customers 100 percent of all charges billed to it, including all overcharges allegedly resulting from antitrust violations, and is prohibited by state law from deriving profits or excess revenues from the payments from its customers; as to this question, the courts of appeals are in conflict.

3. Whether a plaintiff lacks standing under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), where the plaintiff is required by state law to pass on to its customers 100 percent of all of the charges billed to it, including all overcharges allegedly resulting from RICO violations, and is prohibited by state law from deriving profits or excess revenues from the payments from its customers.

LIST OF PARTIES AND RULE 28.1 LISTING

The parties to the proceedings before the United States Court of Appeals for the Sixth Circuit were the City of Detroit and Coleman Young, petitioners Nancy Allevato, as Personal Representative of the Estate of Michael J. Ferrantino, Sr., Sam Cusenza, Joseph Valentini, Charles Carson, Walter Tomyn,* Vista Disposal, Inc., Michigan Disposal, Inc., Wayne Disposal, Inc., Wolverine Disposal, Inc. and Wolverine Disposal-Detroit, Inc., and respondents the County of Oakland and the County of Macomb.

In addition to the parties set forth above, Charles Beckham and Darralyn Bowers were parties to the proceedings before the United States District Court for the Eastern District of Michigan.

The respondents before the Court are the County of Oakland and the County of Macomb.

The corporate petitioners state that they have no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

*Petitioner Walter Tomyn's name was misspelled as "Walter Tomlyn" in the Sixth Circuit's Decision and in its Order Denying Petitions for Rehearing and Suggestions for Rehearing En Banc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners Nancy Allevato, as personal representative of the Estate of Michael J. Ferrantino, Sr., Wayne Disposal, Inc., Sam Cusenza, Joseph Valentini, Charles Carson, Wolverine Disposal, Inc., Wolverine Disposal-Detroit, Inc., Walter Tomyn and Michigan Disposal, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on January 27, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed and the Order denying the Petitions for Rehearing and Suggestions for Rehearing En Banc are reported at 866 F.2d 839, and are reprinted in Appendix A hereto, pp. 1a-28a, *infra*.

The memorandum opinion of the United States District Court for the Eastern District of Michigan is reported at 620 F. Supp. 1399, and is reprinted in Appendix B hereto, pp. 29a-37a, *infra*.

The memorandum opinion of the United States District Court for the Eastern District of Michigan denying respondents' motion to alter judgment is reported at 628 F. Supp. 610, and is reprinted in Appendix D hereto, pp. 39a-47a, *infra*.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit sought to be reviewed (the "Decision") was entered on January 27, 1989. A Petition for Rehearing and Suggestion for Rehearing En Banc was duly and timely filed on February 9, 1989. The United States Court of Appeals for the Sixth Circuit entered an order denying the Petition for Rehearing and Suggestion for Rehearing En Banc on April 19, 1989. Petitioners duly and timely filed a Motion for Stay of Mandate in the United States Court of Appeals for the Sixth Circuit on April 24, 1989. The United States Court of Appeals for the Sixth Circuit entered an order granting the motion for stay of mandate on April 28, 1989.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit is invoked under 28 U.S.C. § 1254(1) (Supp. 1989).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision and statutes involved in this case are: U.S. Const., art. III, § 2[1], 15 U.S.C. § 15(a) (Supp. 1989), and 18 U.S.C. § 1964(c) (1984). The above constitutional provision and statutes are set forth in pertinent part in Appendix G hereto, p. 54a, *infra*.

STATEMENT OF THE CASE

The County of Oakland, Michigan, brought an action for damages against petitioners, the City of Detroit ("Detroit"), its mayor and others alleging that petitioners, Detroit and its mayor violated the federal antitrust laws, 15 U.S.C. §§ 1-7 (1973 & Supp. 1989), and that petitioners and Detroit, but not its mayor, violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-86 (1984 & Supp. 1989) ["RICO"]. The Complaint alleged injury in the business or property of the County of Oakland because:

> the amounts [paid to] Detroit [by the County of Oakland] for the treatment and disposal of [the County of Oakland's] sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of [Detroit Waste Water Treatment Plant] sludge caused by Defendants' unlawful conduct.[1]

(R.1: Complaint and Amended Complaint ¶¶ 49, 53, 66, 69, 76, 83, 86). The County of Macomb, Michigan, was later permitted to intervene in this action as an additional plaintiff. (R. 119: Amended Complaint).

The County of Macomb and the County of Oakland (together the "Counties"), have a statutorily created relationship with Detroit for the purpose of transporting and disposing sewage. The Counties transport sewage generated by the municipalities within their boundaries, through sewer systems owned and operated by the Counties, to Detroit's sewer interceptors for eventual disposal by the Detroit Waste Water Treatment Plant ("DWWTP"). The DWWTP treats the sewage and arranges for disposal of the residual sludge and other by-products. The Counties' sewer systems connect with the sewer systems of the municipalities within the Counties.

Detroit bills the Counties for the costs of sewerage services, including the costs of sewage treatment and sludge hauling and disposal. The Counties, in turn, bill the municipalities for sewerage services according to certain formulae based on each municipality's usage of sewerage services. The municipalities then bill the ultimate consumers of sewerage services (the "end-users").

The Counties act as mere economic conduits in their contractual relationship with the municipalities, which, in turn, act as mere economic conduits in their relationship with the end-users. (R. 351: Affidavit in Support of Motion to Alter Judgment ¶ 24). Pursuant to statutorily-created relationships that were established long before the alleged unlawful activities, the Counties simply collect from the municipalities the monies necessary to cover the Counties' costs for

[1]Respondents cannot sue as *parens patriae* on behalf of their citizens because Congress has delegated this power to state attorneys general. *See* 15 U.S.C. § 15c (Supp. 1989). Respondents are maintaining that they, themselves, were injured by the alleged unlawful actions.

building, operating and maintaining the Counties' sewer systems and pay Detroit with these funds.[2] Among these costs are the amounts billed by Detroit.[3] Pursuant to procedures prescribed by the Michigan State Treasurer, *see* Mich. Comp. Laws § 141.421 (1976 & Supp. 1989), the Counties established separate and segregated "enterprise funds" specifically to collect from the municipalities and to pay Detroit. (R. 351: Affidavit in Support of Motion to Alter Judgment ¶¶ 16(b), 24). No profits or excess revenues can be retained from these funds, *County of Oakland* v. *City of Detroit*, 866 F.2d 839, 850 n.6 (6th Cir. 1989); Appendix A at p. 23a n.6, nor can the Counties lose revenues as they are not statutorily authorized to pay Detroit from any funds *other* than the specially created enterprise funds.[4]

It is the sludge hauling and disposal portions of the costs billed by Detroit to the Counties that the Counties alleged were inflated by unlawful actions of petitioners. The Counties alleged that the

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[2]The Complaints described the contracts with the municipalities as follows:

> Detroit charges [the Counties] according to the costs incurred by Detroit in providing the treatment and disposal service. [The Counties], in turn, collect[] revenues from municipalities with each [sewage] District and pay[] Detroit. . . .

(R. 1, 119: Complaint and Amended Complaint ¶ 20).

[3]Detroit purchased sludge disposal services from petitioners Wayne Disposal, Inc., Wolverine Disposal, Inc., Wolverine Disposal-Detroit, Inc. and Michigan Disposal, Inc., and billed the Counties for sludge treatment hauling, disposal and other costs. (R. 1, 119: Complaint and Amended Complaint ¶¶ 19, 20). Although the Counties are not true direct purchasers because they did not purchase sludge disposal services *directly* from these named sludge disposal companies, the courts below have treated the Counties' purchases as jointly and directly from Detroit and the above petitioners.

[4]The Michigan statutes that dictate the Counties' relationship with the municipalities state that rates from the Counties to the municipalities are set equal to the charges from Detroit, to wit:

> Any charges specified in any such [municipality-county] contract shall be subject to increase by such county at any time, if necessary, in order to provide funds to meet the obligations of the [sewerage] project.

Mich. Comp. Laws § 123.745 (1967 & Supp. 1989). The Counties are not authorized to make a profit or sustain a loss of revenues on sewerage contracts with municipalities. *See* Mich. Comp. Laws §§ 123.745-123.747 (1967 & Supp. 1989).

The Sixth Circuit, in a separate and unrelated case, agreed that the Counties' fully pass on all costs to the municipalities. *County of Oakland* v. *City of Berkley*, 742 F.2d 289, 292, 296 (6th Cir. 1984).

late Michael J. Ferrantino, Sr., whose estate is a petitioner herein, had ownership interests in Michigan Disposal, Inc. and Wayne Disposal, Inc., and contrived to procure a sludge-hauling contract through a company known as Vista Disposal, Inc. The proposal submitted by Vista Disposal, Inc. for sludge-hauling and other services at the DWWTP contained allegedly false statements.[5] Mayor Coleman Young of Detroit, used his extraordinary court-conferred powers to award the contract to Vista Disposal, Inc. without competitive bidding and without approval of the Common Council of Detroit.[6]

The petitioners separately filed motions to dismiss the Complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to allege injury sufficient to confer standing pursuant to the U.S. Constitution, the federal antitrust laws and RICO. (R. 116, 117, 140, 141: Motions to Dismiss Complaint). The U.S. District Court for the Eastern District of Michigan granted these motions and dismissed the Counties' Complaint for lack of standing. (R. 348: Order Granting Defendants' Motion to Dismiss All Counts of the Complaint; Appendix C at p. 38a). The district court held that the Counties:

> have not alleged the requisite damages to maintain standing in this matter. The Counties sustain no injury because they are only an intermediary. . . . The Counties are, in a sense, mere collection agencies.

County of Oakland v. *City of Detroit*, 620 F. Supp. 1399, 1402-03 (E.D. Mich. 1985), *rev'd*, 866 F.2d 839 (6th Cir. 1989); R. 347; Appendix B at p. 34a. The district court also denied the Counties' motion to alter judgment, pursuant to Fed. R. Civ. P. 59(e). *County of Oakland* v. *City of Detroit*, 628 F. Supp. 610 (E.D. Mich. 1986); R374; Appendix D at p. 39a and R. 375: Order Denying Plaintiffs' Motion to Alter Judgment; Appendix E at p. 48a.

On January 27, 1989, the Sixth Circuit reversed and remanded the lower court's dismissal of the Complaint, holding that the Counties had standing under the U.S. Constitution, section 4 of the Clay-

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[5]These allegedly false statements have led to the criminal prosecution and conviction of certain of the petitioners herein and others under RICO, the Hobbs Act, 18 U.S.C. § 1951 (1984) and the federal mail fraud statute, 18 U.S.C. § 1341 (1984).

[6]*See United States* v. *City of Detroit*, 476 F. Supp. 512, 515 (E.D. Mich. 1979).

ton Act, 15 U.S.C. § 15(a) (Supp. 1989), and RICO, 18 U.S.C. § 1964(c) (1984).

REASONS FOR GRANTING THE PETITION

I. Introduction.

This Petition presents a significant question concerning which person in an economic distribution chain suffers an injury sufficient to confer standing, as required by the U.S. Constitution, the federal antitrust laws and RICO. This question is critically important in the administration of these federal statutes in virtually every action involving direct and indirect purchasers of goods or services. If this question is left unsettled, standing will be granted to parties suffering no injuries and multiple treble damages recoveries may result.[7]

In this case, parties (the Counties) that nominally "purchased" services at allegedly unlawfully inflated prices and resold such services have standing to sue the sellers of the services, when they, by statute, cannot retain profits or excess revenues from their "purchases" and "resales" of such services. The parties are thus nothing more than economic conduits that passed on 100 percent of the alleged unlawfully inflated price. In this case, Michigan law required that the municipalities pay the Counties for the total amount of all sewerage services, including allegedly illegal overcharges, and that the Counties neither retain profits or excess revenues from the transactions, nor pass on less than 100 percent of the total costs for the services provided. Thus, the Counties could not absorb any portion of any alleged overcharge and could not sustain any injury due to lost "profits" from a decrease in sales. Therefore, there exists here a *perfect* pass on by the Counties of all of the alleged overcharges.[8]

Petitioners are arguing that they should not be exposed to multiple treble damages liability as a result of standing being conferred on

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[7]A similar question of standing was raised in a petition for writ of certiorari filed only weeks ago. *Kansas* v. *The Kansas Power & Light Co.*, 58 U.S.L.W. 3002 (U.S. June 26, 1989) (No. 88-2109).

[8]This issue has an equal impact on the question of whether the end-users, to whom 100 percent of the alleged illegal overcharge was passed on, have standing to sue petitioners for violations of the federal antitrust laws and RICO.

parties that have not sustained any injury.[9] This is not a hypothetical concern because the Sixth Circuit apparently would permit all persons along the economic distribution chain to maintain actions, *see* 866 F.2d at 852; Appendix A at pp. 27a-28a, and these persons have in fact already filed separate actions, which have been stayed pending the outcome of this action.[10]

This case exemplifies the cost-plus exception to the rule established in the two antitrust cases that have squarely addressed the issue of passing on, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). *Hanover Shoe* and *Illinois Brick* recognized the exception, but left unaddressed its precise boundaries. The *perfect* pass on presented here justifies allowing the defensive use of the pass on theory by petitioners to avoid duplicative treble damages liability and presents this Court with an opportunity to finally settle the question as to the viability and application of the cost-plus exception, which has been subject to conflicting interpretations by the federal circuits.

The Sixth Circuit's Decision, as the Sixth Circuit acknowledges in its Order Denying the Petitions for Rehearing and Suggestions for Rehearing En Banc, directly conflicts with the Seventh Circuit's interpretation of the cost-plus exception. 866 F.2d at 852; Appendix A at pp. 27a-28a. *See* Sup. Ct. R. 17.1(a). The Seventh Circuit's decision applied the cost-plus exception to an even more complicated case, where it found that the direct purchaser passed on 100 percent of an alleged overcharge to its customers.

The Sixth Circuit, as more fully explained in Section II.B.3. herein, completely disregarded the fact that the Counties sustained no real injury and recognized two types of hypothetical injuries that were neither pled nor argued by the Counties. The Decision also

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[9]Even if no other parties can or will maintain an action, this alone is no reason to confer standing on the Counties. *See Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974).

[10]The end-users' class action is styled *County of Oakland, Alice Schoenholtz, David Snyder, et al.* v. *Charles Beckham, et al.*, No. 86-CV-74656-DT (E.D. Mich. filed Nov. 5, 1986) and the action by certain municipalities is styled *Charter Township of Canton, et al.* v. *City of Detroit, et al.*, No. 86-CV-70642-DT (E.D. Mich. filed Feb. 19, 1986).

justified conferring standing on the direct purchasers by focusing on the complexities of apportioning damages among the allegedly injured indirect purchasers due to the various price apportionment formulae and the sheer number of indirect purchasers (which we shall call "horizontal apportionment problems"). However, the complexities deemed relevant by *Hanover Shoe* and *Illinois Brick* involved problems of apportioning damages between the direct and indirect purchasers due to the complexities of the interaction of the forces of supply and demand (which we shall call "vertical apportionment problems"). The Decision is therefore inconsistent with the rationale of *Hanover Shoe* and *Illinois Brick*, which held that only vertical apportionment problems close off the use of the pass on theory, and where no such problems exist, a party should be able to use the pass on theory. *See* Sup. Ct. R. 17.1(c). This Court should specifically settle this important issue of federal antitrust law, correct the Sixth Circuit's misapplication of the rationale of *Hanover Shoe* and *Illinois Brick*, and establish a uniform rule detailing the application of the cost-plus exception. Otherwise, antitrust litigation involving direct and indirect purchasers may result in multiple treble damages recoveries and standing (and recovery) being conferred on parties suffering no injury.

The Sixth Circuit's Decision also creates standing under RICO where no injury to the plaintiffs exists. The Decision, without analysis, simply assumed that since the language of section 1964(c) was nearly identical to section 4 of the Clayton Act, the standing requirements of RICO were equivalent to the standing requirements under section 4. Yet the purposes of RICO differ from the purposes of the federal antitrust laws. RICO, as more fully discussed in Section V. herein, is designed to compensate the actual innocent victims of racketeering. By conferring standing on an entity that has suffered no injury in its business or property under 18 U.S.C. § 1964(c), the Sixth Circuit offends a critical objective of RICO. This Court has not directly addressed this important issue. *See* Sup. Ct. R. 17.1(c).

II. The Decision Misinterprets, Ignores and is Inconsistent with Applicable Supreme Court Authority.

A. The Decision Grants Constitutional Standing to Parties That Have Not Suffered Any Injury.

The Sixth Circuit sets a dangerous precedent by departing from the concept of injury in fact in holding that the Counties have standing to sue under U.S. Const. art. III, § 2[1], where the Counties cannot allege that they have suffered an injury in fact as a result of the alleged overcharge by petitioners. No element of injury from the alleged overcharges could have remained with the Counties because, as the Decision recognized, "any and all overcharges were passed on to the counties' own customers, the municipalities." 866 F.2d at 845; Appendix A at p. 11a.[11]

A party to federal litigation must satisfy the "case or controversy" requirement of the Constitution, U.S. Const. art. III, § 2[1], whereby "a complaint must describe some actual or threatened injury to the complaintant, must allege a causal connection between that injury and the defendant's putatively illegal conduct, and must advance some legally cognizable claim for redress." 866 F.2d at 845; Appendix A at p. 11a (quoting *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)). The focus is not on whether an unlawful act has occurred, but rather on whether the plaintiff has been sufficiently harmed to warrant bringing a claim. Moreover, "the 'injury in fact' test requires more than an injury to a [legally] cognizable interest. It requires that the party seeking review be himself among the injured." *Id.* at 734-35.

"[P]laintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617

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[11]This "pass on" was mandated by a comprehensive Michigan statutory scheme whereby the Counties charged their municipal customers for *all* the costs of sewerage services, including the allegedly inflated costs for sludge disposal, and could not retain any profits or excess revenues, nor make up any shortfalls from other County funds. (*See* Section I. herein).

(1973) (footnote omitted). This must be affirmatively pled in the complaint. *See Sierra Club*, v. *Morton*, 405 U.S. 727, 735 n.8. (1972).

The Counties here cannot and do not allege any actual or threatened injury in fact. Their only "stake" in the outcome of this case is whether they will receive an undeserved windfall treble damage recovery. Viewed in another light, had petitioners not charged the allegedly inflated price or charged less than the "market" price, the Counties' sewer systems and enterprise funds would be no better off or no worse off than they are today. The Decision, however, disregards the actual effect of the pass on and focuses only on the shallow aspect of the price paid, stating that "[m]uch of the relevant caselaw [sic], indeed, seems to treat the imposition of an unlawfully inflated price on a direct purchaser as an injury *per se*." 866 F.2d at 847; Appendix A at 15a. The case law relied upon by the Sixth Circuit, however, is inapposite on the issue of whether the Counties suffered an injury in fact in light of the *perfect* pass on.[12]

The Decision places unwarranted reliance on *Bacchus Imports* v. *Dias*, 468 U.S. 263 (1984), for its proposition that a plaintiff has standing to sue for the allegedly unlawful imposition of an overcharge, despite the fact that the plaintiff successfully passes on all of such overcharge to its customers. In particular, the Sixth Circuit focused on the *Dias* Court's holding that plaintiff wholesalers have standing because they are liable for the allegedly unconstitutional excise tax on alcoholic beverages, and "[a]lthough they may pass it on to their customers, they must return the tax to the State whether or not their customers paid their bills." 468 U.S. at 207. In addition, "even if the tax is completely and successfully passed on, it increases

[12]The older cases cited in the Decision, *Southern Pacific Co.* v. *Darnell-Taezner Lumber Co.*, 245 U.S. 531 (1918); *Adams* v. *Mills*, 286 U.S. 397 (1932), as the Sixth Circuit itself acknowledged, were "influenced by concepts of privity that have lately passed out of fashion . . . ." 866 F.2d at 846; Appendix A at p. 13a. *See also Southern Pacific*, 245 U.S. at 534; *Adams*, 286 U.S. at 407-08. In addition, neither these cases, nor the other case cited in the Decision, *Bacchus Imports* v. *Dias*, 468 U.S. 263 (1984), involved situations where the direct purchaser was *required* to pass on the *entire* amount of an illegal overcharge. Consequently, the "direct purchasers" in *Southern Pacific*, *Adams* and *Dias* all faced losses of total sales and profits from a decrease in demand due to the higher price charged to customers. The Counties, on the other hand are, by law, prevented from retaining any profits or revenues. Thus, they are completely insulated from injury from the market effects of the overcharge.

the price of [the wholesalers'] products as compared to the exempted beverage, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business." *Id.*

The Sixth Circuit ruled that the Counties suffered the first type of injury identified in *Dias*, stating "[t]he plaintiff counties were liable for Detroit's allegedly inflated sewerage charges, just as the plaintiff wholesalers in *Dias* were liable for Hawaii's allegedly unconstitutional tax, whether or not the plaintiffs' customers paid their bills." 866 F.2d at 846-47; Appendix A at p. 14a. This ignores the fact that the Counties have no obligation to Detroit for any *hypothetical* non-payment by the municipalities.[13] A more proper cause of action for this type of injury, assuming it exists, would be against a defaulting municipality if and when a default occurs.[14]

As more fully discussed in Section I. herein, the second type of injury identified in *Dias* is not present here because the Counties are statutorily prohibited from making a profit, and thus an increase in the retail price of sewerage services, and the possible resulting decrease in demand, would have no adverse competitive impact on the "business" of the Counties. The Counties are not businesses. The Sixth Circuit literally manufactures an adverse competitive impact, very loosely styled after the second type of injury identified in *Dias*, by making the Counties "businesses" and arguing that the alleged overcharges injured the Counties' by impairing their ability to attract

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[13]The Sixth Circuit, in *County of Oakland* v. *City of Berkley*, 742 F.2d 289, 296 (6th Cir. 1984), stated "the failure of any of the municipalities . . . to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal." The County of Oakland, in its brief to the Sixth Circuit in *County of Oakland* v. *City of Berkley*, admitted that the County would not be liable to Detroit because it, through its managing agent, the Drain Commissioner, was only "a conduit or managing agent for members of the system." (R. 358: Oakland County's Brief to the Sixth Circuit in *County of Oakland* v. *City of Berkley* at 21 (Attached as Exhibit B to Defendants Allevato, Carson and Wayne Disposal's Joint Response to Motions of Oakland and Macomb Counties to Alter or Amend Judgment)).

[14]Even assuming that the Counties were obligated to pay Detroit if the municipalities defaulted, the injury that would redound to the Counties would not be of the type "caused by the challenged activity," *see* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure 2d* § 3531.4 at 418 (1984), but rather would be injuries hypothetically caused by the municipalities.

or retain residents and businesses.[15] This assertion of injury was neither pled nor argued by the Counties. The Decision's discussion of this so-called injury to the Counties' desirability shows just how far afield the Sixth Circuit has gone in an attempt to find that the Counties have standing to sue.

If the Counties have standing to sue for this "injury," they would have standing to sue for injuries caused by *any* activity that has the effect of deterring individuals or businesses from locating or remaining in the Counties. For instance, under the Sixth Circuit's reasoning, the Counties would have standing to argue that they were injured by a conspiracy among gas station owners to raise the retail price of gasoline, because individuals and businesses may be deterred from locating or remaining in the Counties because of high gasoline prices resulting from the conspiracy. This is clearly not the type of injury sufficient to confer constitutional standing.

Finally, the Decision completely misconstrues the rule in *Sierra Club*, 405 U.S. at 735 n.8, that standing must be affirmatively pled. The Counties have not come forward with any allegation of the injuries discussed in the Decision. The Sixth Circuit, however, held that the Counties' failure to plead injury does not affect their standing. 866 F.2d at 847; Appendix A at p. 15a. The essential purpose of standing, however, is to assure at the outset of litigation that the plaintiff is the proper party to invoke the jurisdiction of a federal court. *See Linda R.S.*, 410 U.S. at 617. If, as the Sixth Circuit propounds, courts must engage in pure speculation as to whether a plaintiff has suffered an injury in fact, then the entire concept of standing becomes a useless exercise.

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[15]The Sixth Circuit described this injury as follows:

> The counties may not have been in competition with others for the sale of sewer services, but surely these counties were in competition with other counties in attempting to attract and retain people and/or industry and commerce. We are not prepared to assume that the availability of cost-effective sewer services cannot affect decisions on where houses will be built, where commercial and industrial enterprises will be located, and where taxpayers will choose to live. . . . there are plenty of other counties in the United States.

866 F.2d at 847; Appendix A at p. 15a.

B. The Decision Ignores the Rationale of *Hanover Shoe* and *Illinois Brick* in Holding That the Cost-Plus Exception Does Not Apply.

The cost-plus exception set forth in *Hanover Shoe* and *Illinois Brick* has not yet been delimited by this Court. This case presents a *perfect* pass on and therefore a perfect opportunity to settle the issue of precisely when the cost-plus exception applies. The Sixth Circuit ignored the economic impact of the perfect pass on and instead relied entirely on horizontal apportionment problems (*i.e.*, problems of apportioning damages among parties at the same level of the economic distribution chain) in concluding that the cost-plus exception does not apply and that the pass on theory cannot be used defensively by petitioners to show that respondents did not suffer sufficient injury to confer standing. This consideration of horizontal apportionment problems has little relationship with the dynamics of the pass on. Moreover, it is inconsistent with this Court's prior decisions in *Hanover Shoe* and *Illinois Brick*, which held that only vertical apportionment problems (*i.e.*, problems of apportioning damages between parties at different levels of the economic distribution chain) are relevant in preventing the use of the pass on theory, and where such problems are not present, such as with the pre-existing cost-plus contract exception, the pass on theory may still be used. If the Sixth Circuit's Decision is allowed to stand, courts in the Sixth Circuit will be forced to consider irrelevant horizontal apportionment problems, which will eventually result in the withering away of the rationale of *Hanover Shoe* and *Illinois Brick*.

On the facts presented in *Hanover Shoe* and *Illinois Brick*, this Court declined to permit the use of the pass on theory. The key rationale (the "apportionment rationale") was that vertical apportionment of damages would be nearly impossible because it would necessitate analyzing the interaction of the forces of supply and demand, and potentially would result in multiple treble damages recovery among parties at different levels of the economic distribution chain. *Hanover Shoe*, 392 U.S. at 492-93; *Illinois Brick*, 431

U.S. at 731-32, 741-42.[16] *Hanover Shoe* and *Illinois Brick* both realized that vertical apportionment problems did not occur in all situations, for instance, with pre-existing cost-plus contracts, and thus left open the cost-plus exception to the rejection of the use of the pass on theory. *Hanover Shoe*, 392 U.S. at 494; *Illinois Brick*, 431 U.S. at 736.[17]

The Sixth Circuit's discussion and rejection of the cost-plus exception sheds light on the its dim view of an exception consistently recognized by this Court:

> Mindful, as we were in *Jewish Hospital Assn. v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 975 (6th Cir. 1980), *cert. denied*, 450 U.S. 966, 101 S.Ct. 1483, 67 L.Ed.2d 615 (1981), "of the *Illinois Brick* Court's emphasis upon the narrow scope of the exemptions to the indirect-purchaser rule," we are not persuaded that a cost-plus contract exception, *assuming it exists*, precludes the direct purchaser from maintaining suit in the case at bar.

866 F.2d at 849; Appendix A at pp. 20a-21a (emphasis added). The Sixth Circuit's cynical tone intimates that it rejects the cost-plus exception. The Sixth Circuit's reliance on the horizontal apportionment problems confirms this, and has the practical effect of dispensing with the exception altogether.

The Sixth Circuit's analysis ignores the economic impact of the alleged overcharge on the Counties, their municipal customers and

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[16]A subsidiary rationale (the "enforcement rationale") was that allowing the use of pass on theory would impair enforcement of the antitrust laws because it would leave to sue only indirect purchasers with only a tiny stake in the outcome. *Hanover Shoe*, 392 U.S. at 494. Primary emphasis is placed on the apportionment rationale and secondary emphasis on the enforcement rationale because this Court, in *Hanover Shoe*, recognized an exception for pre-existing cost-plus contracts which "'mak[e] it *easy to prove* that [the direct purchaser] has not been damaged.'" *Illinois Brick*, 431 U.S. at 732 n. 12. *Illinois Brick* (quoting *Hanover Shoe*, 392 U.S. at 494) (emphasis in original). The amount of the stake a customer would have in an action is not likely to depend on whether the customer had purchased under a cost-plus contract or in a competitive market. *Id.* This was very recently reaffirmed by this Court in *California* v. *ARC America Corp.*, 490 U.S. at _____, 109 S.Ct. 1661, 1666 n.6, 104 L.Ed.2d 86, 95 n.6 (1989).

[17]The Court's recent decision in *ARC America*, 490 U.S. _____, 109 S.Ct. 1661, 104 L.Ed.2d 86, reaffirmed the continued viability of the cost-plus exception to the rule in *Illinois Brick* and *Hanover Shoe*.

the end-users. There is no question that the end-users would sustain the entire impact of the alleged overcharge. As the Sixth Circuit acknowledged, "100% of the charges [and alleged overcharges] imposed by Detroit on the [Counties] were passed on by the [Counties] to the municipalities, which would make the [Counties] a 'conduit' in an economic sense." 866 F.2d at 845; Appendix A at p. 11a. Moreover, the Counties, unlike the ordinary middleman with a cost-plus contract, were statutorily prohibited from absorbing any of the overcharge from the "sale" of sewerage services to municipalities. Thus, the entire effect of the overcharge could be "determined in advance [and with absolute certainty] without reference to the interaction of supply and demand that complicates the determination in the general case." *See Illinois Brick*, 431 U.S. at 736. In such situations, as this Court stated, the reasons for rejecting the pass on theory do not exist. *Id.*

The Sixth Circuit rejected the application of the cost-plus exception because it believed that allowing the defensive use of the pass on theory "in this particular case . . . would invite precisely the sort of complexities, uncertainties and other untoward consequences that the indirect-purchaser rule was designed to avoid." 866 F.2d at 849; Appendix A at p. 21a. But the complexities deemed relevant by the Sixth Circuit are horizontal apportionment problems stemming from the fact that the Counties resold sewerage services to numerous municipalities, based on a number of pricing formulae and that the municipalities then sold such services to the end-users under similar formulae. *Id.*[18] While these apportionment formulae may be complex, the municipalities, as a group, pay the entire costs of the Counties—*and only those costs*. Additionally, the end-users pay the entire costs of the municipalities.[19] No profits or excess

[18]The County of Oakland bills the municipalities within its boundaries for its costs for sewerage services based on estimates of actual usage, on adjusted apportionments based on readings from master water meters within a sewage district or on the totals compiled from individual water meter readings. In Macomb County, the costs for sewerage services are billed based on the municipalities' metered flows and adding a fixed service charge.

[19]The municipalities bill their individual residential and commercial customers under a procedure similar to Oakland County's. Each community that operates its own sewer system allocates the charges from the County among its customers based on the costs of building, maintaining and operating its local sewer system. These formulae and the Counties' formulae apparently have well served the billing needs of the end-users, the municipalities, the Counties and Detroit for decades.

revenues are retained by the Counties.

The "complexities, uncertainties and other untoward consequences" discussed in *Illinois Brick* and *Hanover Shoe* were not "precisely the sort" discussed by the Sixth Circuit. They were not horizontal apportionment problems, but rather were vertical apportionment problems stemming from the nearly impossible task of calculating the interaction of the forces of supply and demand to determine whether and in what proportion actors *at different levels of the distribution chain* absorbed an illegal overcharge and could thus claim injuries "in [their] business or property."[20] The horizontal complexities relied upon by the Sixth Circuit complicate only the apportionment of damages among the claimants at the *same level* of the distribution chain—the end-users. Such complexities are commonly encountered in the damages stage of any class action and would be no different had the plaintiffs been a large class of purchasers that purchased sewerage services *directly* from petitioners.[21]

The question begged by the Decision and which should be settled by this Court is whether the mere presence of horizontal problems of apportioning damages among many purchasers at the same level of the chain of distribution (which complexities have no economic relationship whatsoever with the passing on of an overcharge) justifies conferring standing on plaintiffs that have suffered no damages, and exposing defendants to multiple treble damages liability. *See Illinois Brick*, 431 U.S. at 730.[22]

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[20]This Court, in *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 474-75 (1982), described this concern as "the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws."

[21]The most common (and virtually the only) type of antitrust class action suits are those alleging price fixing. *See e.g.*, *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 256 (1972); *In re Plywood Antitrust Litig.*, 655 F.2d 627 (5th Cir. 1981), *cert. dismissed*, 462 U.S. 1125 (1983).

[22]The Court's recent decision in *ARC America* also opens up the possibility that significantly more antitrust actions may result in multiple recoveries—by direct purchasers under federal antitrust law and again by indirect purchasers under the numerous state statutes which repeal *Illinois Brick*. Michigan, fourteen other States and the District of Columbia all currently have so-called "*Illinois Brick* repealer" statutes. 490 U.S. at ____ n.3, 109 S.Ct. at 1664 n.3, 104 L.Ed.2d at 93-94 n.3. Thus, it is important that this Court clarify the availability of the pass on theory in order to avoid *unnecessary* multiple recoveries by indirect purchasers under state law and by direct purchasers under federal law.

The Sixth Circuit also placed an undue and improper emphasis on the "enforcement rationale" of *Hanover Shoe* and *Illinois Brick*. *See* 866 F.2d at 850; Appendix A at p. 22a. The Sixth Circuit's single-minded focus on the concentration of recovery in the direct purchasers overlooks this Court's relegation of the enforcement rationale to secondary status. *See Illinois Brick*, 432 U.S. at 732 n.12; *ARC America*, 490 U.S.___ at n.6, 109 S.Ct. at 1666 n.6, 104 L.Ed.2d at 95 n.6, and the fact that this case presents no problems of deterring classes of litigants because there is no question about which parties in the economic distribution chain suffered *all* the injuries from the alleged overcharge. Moreover, if there is any party along the economic distribution chain whose enforcement of the antitrust laws would be ineffective, it is the Counties because they could not retain the fruits of victory.[23]

III. The Decision Conflicts with Decisions from Other Circuits.

The Decision is in direct conflict with the broad interpretation of the cost-plus exception taken by the Seventh Circuit, which held that the cost-plus exception applied to situations not involving fixed-quantity cost-plus contracts. *Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 109 S.Ct. 543 (1988) (allowing the offensive use of the pass on theory under the cost-plus exception).

The Sixth Circuit, in its Order Denying Petitions for Rehearing and Suggestions for Rehearing En Banc, recognized that the broad reading of the cost-plus exception by the Seventh Circuit in *Panhandle Eastern* was directly conflicting with its Decision and invited this Court to grant certiorari to review this conflict among federal circuits. 866 F.2d at 852; Appendix A at pp. 27a-28a. The Sixth Circuit effectively permits only offensive use of the pass on theory. *Id.* (*Panhandle Eastern*'s broad reading of the cost-plus exception should not apply to defensive use of the pass on theory). This refusal to permit defensive use of the pass on theory is incorrect and opens the floodgates to multiple treble damages recoveries. This limitation is not only incorrect, but it opens the floodgates to multiple treble damages recoveries. This Court in

[23]The Sixth Circuit itself notes, "[a]s we understand it, however, the funds are non-profit, so any recovery would ultimately have to be passed through to the end-users via charges lower than those that would otherwise be imposed." 866 F.2d at 850 n.6; Appendix A at p. 23a n.6.

Illinois Brick previously ruled that the pass on theory must apply *equally* to the offensive use of the pass on theory by plaintiffs *and* to defensive use of the pass on theory by defendants, because any other result would open the door to multiple treble damages recoveries. 431 U.S. at 728-36. There is absolutely no authority that the same is not true for the cost-plus exception. Multiple recoveries will surely result in this case if the Decision stands. If the municipalities and end-users are allowed to use the cost-plus exception to the pass on theory offensively, pursuant to *Panhandle Eastern*, but petitioners are denied the defensive use of the exception against this action by the Counties, petitioners will face three-fold treble damage liability! *See Illinois Brick*, 431 U.S. at 730-31 & n.11. Therefore, it is critical that the conflict be settled by this Court.

The Seventh Circuit in *Panhandle Eastern*, unlike the Sixth Circuit, analyzed the rationale of the rule in *Hanover Shoe* and *Illinois Brick* to hold that the cost-plus exception was available where the problems of apportioning the absorption of the overcharge between direct and indirect purchasers were not present, regardless of whether a fixed quantity contract existed. In *Panhandle Eastern*, the state of Illinois brought a federal antitrust suit on behalf of the customers of the Central Illinois Light Company ("CILCO"), alleging that the Panhandle Eastern Pipeline Company and others unlawfully inflated the price of natural gas sold to CILCO, which then, pursuant to the Uniform Purchase Gas Adjustment Clause, charged its customers for the full increase in the-cost of natural gas. *Id.* at 898. However, unlike the Counties, CILCO was a profit-making entity and was free to offset a price by reducing another component of its price to residential customers. *Id.* The court found that, despite CILCO's ability to and possible incentive to offset the overcharge, CILCO passed on the entire overcharge in the form of higher rates for natural gas. As to the overcharge, the Seventh Circuit held that only the end-users (the indirect purchasers) may recover. *Id.* at 896.[24]

[24]The *Panhandle Eastern* court also found that end-users may have decreased their demand in response to CILCO's pass on of the entire overcharge. These damages, the Seventh Circuit held, can be easily proven and therefore may be recovered by CILCO. *Id* at 896. The Counties have no standing to sue based on loss of profits because they could not lose any profits from decreased demand. (*See* Statement of the Case herein). Moreover, the Counties sued for only the amount of the alleged overcharges and not for any lost profits due to lost sales. (*See* R. 1, 119: Complaint and Amended Complaint ¶¶ 49, 53, 66, 69, 76, 83, 86).

The pertinent theme of the en banc decision in *Panhandle Eastern* is that the only apportionment complexities that should prevent the use of the pass on theory are vertical, among "successive links in the chain of distribution." *Id.* at 896. When such complexities are not present, the pass on theory may be used, regardless of whether a contract is for fixed quantities.[25] The court noted that "the entire overcharge came to rest on the residential customers and *they alone suffered damage* and can (on the view we take of the case) recover damages." *Id.* (emphasis added). The *Panhandle Eastern* court specifically rejected the notion, which was paramount in the Sixth Circuit's Decision, that horizontal apportionment problems, *among* the class of indirect purchasers, should preclude the use of the cost-plus exception. *Id.* at 897. The Seventh Circuit reiterated in no uncertain terms that the only apportionment concern of *Hanover Shoe* and *Illinois Brick* was vertical apportionment:

> The Court was concerned with the situation where two purchasers of the same thing—the initial purchaser and the purchaser from the initial purchaser—are or could be complaining that both had been hurt, and *the problem is to apportion the loss between them.* Here, only the residential consumers can complain about a loss from the overcharge . . . .

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[25]The Seventh Circuit noted that requiring contracts be for fixed quantities in order to fall under the cost-plus exception was:

> not dictated by precedent . . . there was no reason to believe that the reference to 'fixed quantity' in the Supreme Court's opinion in *Illinois Brick* was intended to govern cases so remote from the actual arrangements under scrutiny in that case. The case did not involve a fixed quantity contract; indeed, it did not involve a cost-plus contract, but merely an argument (which the court rejected, see, 431 U.S. at 744, 97 S.Ct. at 2074) that a buyer's practice of rule-of-thumb cost-plus pricing should be enough to allow his customers to sue the seller. . . . We do a disservice to the Court by wrenching its words out of context and giving them talismanic significance; we make language a trap rather than a mode of communication.

Panhandle Eastern, 852 F.2d at 891.

Id. at 897 (emphasis added). This is squarely in conflict with the Sixth Circuit's Decision, which held that horizontal apportionment problems precluded the use of a pass on defense.[26]

The Tenth Circuit has also recently examined the cost-plus exception and implicitly followed the Seventh Circuit's rule that the cost-plus exception exists where no vertical apportionment problems are presented. *In re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286 (10th Cir. 1989), *petition for cert. filed sub nom.*, *Kansas* v. *The Kansas Power & Light Co.*, 58 U.S.L.W. 3002 (U.S. June 26, 1989) (No. 88-2109). The Tenth Circuit attempted to distinguish *Panhandle Eastern* on the ground that in *Panhandle Eastern* the entire overcharge was passed on but that in *Tight Sands*, the amount of overcharge passed on may be an unresolved question of fact. *Id.* at 1293. But the court continued:

> However, even if we assume, as we do for the purpose of deciding the issues before us, that there was a perfect and provable pass-on . . . *At the most, a perfect pass-on might solve the problem of apportioning damages between the direct and indirect purchaser but for the issue of decreased demand due to higher prices.*

Id. (emphasis added). The above-quoted portion of *Tight Sands* shows that the only aspect of *Panhandle Eastern* to which the Tenth Circuit took exception was the issue whether the decreased demand for the direct purchaser's goods or services (after a *100 percent* pass on of the overcharge) rules out the use of the pass on theory. This issue is not presented here. *Tight Sands* and *Panhandle Eastern* seem to be in harmony, and in conflict with the Sixth Circuit, on the issue of whether the

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[26]In resolving this conflict among the circuits, this Court need not adopt the Seventh Circuit's rationale *in toto* because the instant case does not rival the complexities of *Panhandle Eastern*. The determination of the apportionment of the pass on need not embark on an examination as complex as that performed by the Seventh Circuit. Such a complex examination is unnecessary because the Counties were statutorily prohibited from earning a profit. Thus, this case, more than *Panhandle Eastern*, presents an example of the *perfect* pass on contemplated in *Hanover Shoe* and *Illinois Brick*, where proof of damage to parties along an economic distribution chain is easy and therefore the pass on defense may be used.

cost-plus exception applies to a *perfect* and provable pass on to indirect purchasers.[27]

IV. The Decision Misapplied the Antitrust Standing Criteria of *Associated General Contractors*.

The concept of antitrust standing is a restriction on the parties that can pursue federal antitrust claims. Satisfying the injury requirement is not alone sufficient to have "antitrust" standing under section 4 of the Clayton Act. Much more is required.

> As commentators have observed, the focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.

Associated General Contractors of California, Inc. v. *California State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983) (citations omitted). *Associated General Contractors* discussed five general factors which support a finding of standing: (1) the casual connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury, including the status of the plaintiff as a consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation. *Id.* at 536-44.

The first three factors suggest that the Counties lack standing to sue because all relate to the concept of injury. As discussed above,

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[27]Other circuits have also recognized and applied the cost-plus exception to the pass on rule. *See e.g., In re Beef Industry Antitrust Litig.*, 600 F.2d 1148, 1166 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980) (where the policy reasons behind preventing the pass-on defense are not present, the indirect purchaser should not be barred from suit); *In re Plywood Antitrust Litig.*, 655 F.2d 627, 640 (5th Cir. 1981), *cert. dismissed*, 462 U.S. 1125 (1983); *Merican, Inc.* v. *Caterpillar Tractor Co.*, 713 F.2d 958, 966-67 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984) (distinguishing *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979)).

the Counties have suffered no legally cognizable injuries as a result of the alleged overcharge. Although the Counties were parties to a contract through which the alleged overcharge flowed, the Counties were left unscathed. Furthermore, the Counties, in their capacities as the administrators of the enterprise funds, were not consumers in the market for sewerage services.

The injury to the Counties' desirability as places to locate a home or business that was hypothesized by the Sixth Circuit also fails the injury requirements of *Associated General Contractors*. The Counties cannot sue under the antitrust laws for this hypothetical injury. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), held that states cannot maintain an antitrust action for injuries to their "general economy." Such suits would open the door to duplicative recoveries because the notion of injury to the "general economy" is no more than a reflection of injuries to the business or property of consumers, for which they may recover themselves under section 4, and because judicial proceedings would be unable to cope with separating damages to individuals and damages to the quasi-sovereign interests of a state. *Standard Oil*, 405 U.S. at 263-64. Although Congress later amended the antitrust laws to permit only state attorneys general to sue for such injuries on behalf of their citizens, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, 1394 (codified as amended at 15 U.S.C. § 15c (Supp. 1989)), *Standard Oil* would still prohibit an antitrust suit by the Counties for injury to the Counties' desirability, which is, in essence, an injury to their general economies.[28] Finally, as this Court in *McCready* observed, "[a]n antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but despite the broad wording of § 4, there is a point beyond which the wrongdoer should not be held liable." *McCready*, 457 U.S. at 476-77 (quoting *Illinois Brick*, 431 U.S. at 760 (Brennan, J., dissenting)). The harm hypoth-

[28]If these types injuries are sufficient to confer standing on the Counties, then the only damages they could argue is the loss from individuals and businesses moving away from or failing to locate in the Counties. Such damages are highly speculative because a multitude of factors beyond the price of sewerage services influences whether individuals and businesses remain or locate in a county. Such damages are too speculative to be compensable under the antitrust laws. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 339-40 (1971).

esized in the Decision seems clearly beyond the point which the antitrust laws are intended to provide treble damage recoveries.

The fourth and fifth *Associated General Contractors* factors also indicate that the Counties have no standing to sue here. The potential for duplicative recovery if the Counties may maintain a suit is obvious because an action has been filed by certain municipalities and by a class of end-users alleging individual harm, separate from the harm to the Counties' "desirability." *See Standard Oil*, 405 U.S. at 264-65. Moreover, the Sixth Circuit appears to give the end-users and municipalities standing to sue. 866 F.2d at 852; Appendix A at pp. 27a-28a. Additionally, none of the vertical problems of complex apportionment of damages that were addressed in *Associated General Contractors*, as well as in *Hanover Shoe* and *Illinois Brick*, exist here. *See Associated General Contractors*, 459 U.S. at 544-45. Finally, as to the fifth factor, because the end-users would suffer 100 percent of the brunt of the alleged overcharge, it seems clear that they would be the direct *victims*. Therefore, even if the Counties satisfy the Article III "injury in fact" requirement of standing, they do not satisfy the much more rigorous requirements for *antitrust* standing set forth in *Associated General Contractors*.

V. This Case Presents Important Issues in the Administration and Interpretation of RICO.

This case presents an opportunity for this Court to decide whether, pursuant to 18 U.S.C. § 1964(c), a private entity that has suffered no economic injury because it has passed on all of its potential economic injury to its customers has, nonetheless, suffered an injury "in usiness or property by reason of a violation of [RICO]." *Id.*

The Sixth Circuit incorrectly decided that RICO standing existed under these circumstances because it assumed, as a foregone conclusion, that the standing requirements of the antitrust laws also determine standing under RICO. 866 F.2d at 851; Appendix A at p. 25a. In the process, the Sixth Circuit found injury where none existed.

Despite the virtually identical wording of section 1964(c) and section 4 of the Clayton Act, the legislative history of the two statutes and decisions from this Court and others show that Congress' motives in enacting RICO were different from their motives

in enacting the federal antitrust laws. *See Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 497-500 (1985). While the antitrust laws were designed primarily to vindicate harm to *competition* in the marketplace, *see Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977), RICO was designed to provide a cause of action only to the individual *victims* of racketeering activity under section 1964(c). This Court should decide this important issue of who suffers injury sufficient to confer standing under civil RICO, and whether antitrust principals apply to an analysis of injury under civil RICO. If this Court concludes that antitrust standing and injury issues apply, then this Court must decide the extent to which the pass on defense is applicable and whether the cost-plus exception also exists under civil RICO.

A. The Legislative History and Judicial Interpretation of RICO Show Significant Differences from the Federal Antitrust Laws and Favor Conferring Standing on Persons Suffering *Actual* Harm from RICO Violations.

The Sixth Circuit was incorrect in automatically concluding that the antitrust rules for standing also apply to civil RICO. RICO's legislative history contains few direct references to section 1964(c), *Sedima, S.P.R.L.*, 473 U.S. at 498, but those few statements indicate significant differences between the antitrust laws and RICO.[29]

RICO, unlike the antitrust laws, is aimed primarily at redressing harm to "innocent victims" of unlawful activities. Thus, under RICO, one who suffers the actual impact of racketeering activities should have standing to sue, rather than, as in the antitrust context, appointing a surrogate, such as the direct purchaser, who vindicates harm to the marketplace as well as to all persons in an economic distribution chain. RICO is intended to give standing to the victims of racketeering activities and not to create standing for surrogates suffering no injury.

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[29]*See e.g.*, Organized Crime Control: Hearings on S. 30 Before Subcommittee No. 5, House Committee on the Judiciary, 91st Cong., 2d Sess. (1970); Measures Relating to Organized Crime: Hearings on S. 30, *et al.* Before the Subcommittee on Criminal Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 556-57 (1969); Blakey, *The RICO Civil Fraud Action: Reflections on Bennet v. Berg*, 58 Notre Dame L. Rev. 237, 255 n.52 (1982).

Senator Hruska stated, in introducing a civil RICO provision separate from a provision that would have simply added RICO-type remedies to the Sherman Act:

> the bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman.

115 Cong. Rec. 6993 (1969) (statement of Senator Hruska).

The Sixth Circuit confused the Congressional intent to create a statute with broad remedial measures for victims of racketeering activity with the notion that Congress also intended for RICO to create or grant standing to invoke those broad remedial powers to persons who have not suffered any injury in fact. There is no indication, in the legislative history or the existing case law, that non-injured surrogates should be granted standing to sue under RICO simply because it would be easier for those surrogates to sue. Other than the Sixth Circuit, in its Decision, no court has ever suggested such an interpretation of RICO. In *Sedima*, the Court concluded from the legislative history of RICO that there is:

> no warrant in the language or history of the [RICO] statute for denying recovery thereunder to the *direct victims* of the [racketeering] activity [*e.g.*, the end-users] . . . while preserving it for the indirect.

473 U.S. at 497 n.15 (citations omitted) (emphasis added).

The federal circuits have fashioned numerous tests for standing, all of which place primary emphasis on actual injury, rather than linking standing with an overall policy of vindicating the marketplace. Some circuits characterize the test as one of direct injury flowing from racketeering activities (*i.e.*, conferring standing on the direct *victim*)[30] and others characterize the test in terms of persons suffering injuries factually and proximately caused by racketeering

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[30]*See e.g.*, *Rand* v. *Anaconda-Ericsson, Inc.*, 794 F.2d 843 (7th Cir. 1985), *cert. denied*, 479 U.S. 987 (1986); *Nodine* v. *Textron, Inc.*, 819 F.2d 347, 349 (1st Cir. 1987); *Town of Kearny* v. *Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987); *Warren* v. *Manufacturers National Bank of Detroit*, 759 F.2d 542 (6th Cir. 1985); *Morast* v. *Lance*, 807 F.2d 926, 933 (11th Cir. 1987).

activities.[31] The Sixth Circuit, in fact, previously ruled that the fact that a plaintiff was compensated for its alleged RICO injuries may affect its standing under RICO.[32]

This direct *victim* or proximate cause test of RICO contrasts starkly with the direct/indirect *purchaser* distinction of *Hanover Shoe* and *Illinois Brick*. The end-users here clearly would be the only direct *victims* of the allegedly unlawful activities, even though they were indirect purchasers, because they were the only persons that could be harmed by the alleged racketeering activity—the alleged overcharge. The Counties, as direct purchasers, on the other hand, could not have suffered any actual injury. Nor could the Counties claim direct or proximate injury under RICO to their desirability as places to locate a home or business. *See Illinois* v. *Life of Mid-America Insurance Co.*, 805 F.2d 763, 766-67 (7th Cir. 1986) (RICO does not permit suits for injury to quasi-sovereign interests).

In contrast to RICO's emphasis on protecting actual victims, the antitrust laws place primary emphasis on protecting competition. *See Brunswick*, 429 U.S. at 488. The purpose behind the antitrust laws is "to prevent economic concentration in the American economy by keeping a large number of small competitors in business." *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 275 (1966).

The Seventh Circuit has contrasted the different goals of the antitrust laws and RICO, stating:

> Moreover, to the extent that antitrust law and policy are increasingly concerned primarily with market efficiency rather than the deleterious effects of concentrated market power itself, analogies to that body of law become increasingly irrelevant,

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[31] *See e.g.*, *Sperber* v. *Boesky*, 849 F.2d 60 (2d Cir. 1988); *Bradenburg* v. *Seidel*, 859 F.2d 1179 (4th Cir. 1988); *Ocean Energy II, Inc.* v. *Alexander & Alexander, Inc.*, 868 F.2d 740 (5th Cir. 1989).

[32] Where a plaintiff had previously received restitution for its injuries, the fact of such restitution "would have a bearing on [the plaintiff's] ability to demonstrate that it has suffered a cognizable injury under RICO . . . ." *Michigan Dep't of Treasury* v. *Fawaz*, [1987-88 Transfer Binder] RICO Bus. Disp. Guide (CCH) ¶ 6936, at 8907 (6th Cir. May 9, 1988); Appendix F at p. 51a. In *Fawaz*, the State of Michigan sued a gasoline station owner under section 1964(c), asserting that the mailing of fraudulent sales tax returns to the state constituted racketeering activity under section 1961. Prior to filing the civil RICO suit, the defendant was convicted in a state court for evasion of these same taxes. As part of the criminal sentencing, the defendant was ordered to pay restitution to the state. *Id.*

> since the exercise of social power by organized crime is thought to be *malum in se*.

Schacht v. *Brown*, 711 F.2d 1343, 1358 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983) (footnotes omitted).

This Court in *Hanover Shoe* and *Illinois Brick* was guided by the marketplace considerations of the antitrust laws. Where the apportionment of the harm from antitrust violations was unclear, this Court determined that, on balance, the antitrust laws favor market vindication over compensation of victims, *see Illinois Brick*, 431 U.S. at 746-47, and therefore the direct purchaser was conferred standing because it could better protect the *marketplace* from harm. RICO points clearly in the opposite direction. When faced with the choice of conferring standing to one person or another where apportionment problems similar to those faced in *Hanover Shoe* and *Illinois Brick* exist, as discussed above, the legislative history of RICO mandates conferring standing to sue on the actual victims of the racketeering activities. The only possible *actual* victims of any alleged RICO activities in the present case would be the end-users who would have paid *from their own pockets* any alleged overcharges for sewerage services and who would be the only persons in need of compensation. The Counties clearly could not be victims in any sense and should not be given the opportunity to sue for and recover treble damages under RICO.

To give the Counties standing under RICO simply because they paid the bills for the end-users, with the end-users' money, would be tantamount to giving standing to an agent who pays an extortion demand to a racketeer, on behalf of a client, from his clients' monies.

B. The Decision Fails to Recognize the Intent of RICO or the Dynamics of the Pass On by the Counties.

The Decision simply assumed that the like wording of section 4 and section 1964(c) was sufficient to find that the Counties had RICO standing. 866 F.2d at 851; Appendix A at p. 25a. It did not entertain any analysis of the goals of RICO, which are significantly different than the goals of the federal antitrust laws. The Decision relied primarily on *Carter* v. *Berger*, 777 F.2d 1173 (7th Cir. 1985), in which the Seventh Circuit rejected the offensive use of the pass on theory under RICO in a suit by taxpayers against individuals who defrauded Cook County, Illinois

by undervaluing property. The plaintiffs argued that as a result of the alleged unlawful activities, they had to pay more taxes because Cook County, in response to the lower taxes paid by defendants, raised everyone's tax rates. *Id.* at 1174.[33] The Seventh Circuit found relevant two of the rationale of *Illinois Brick*. First, a suit by the "directly injured" party promotes deterrence. *Id.* at 1176. Second, vertical apportionment of damages, especially in a taxpayer suit involving an allegation that Cook County made a *political decision* to raise taxes in response to certain taxpayers' unlawful underpayments, would be exceptionally difficult. *Id.* at 1177.[34]

Carter, however, does not dictate that the Counties have standing here. Here the end-users, unlike the taxpayers in *Carter*, clearly would be the *actual* and direct victims of the alleged racketeering activities because 100 percent of the alleged overcharge would be *automatically* passed on to them, as mandated by Michigan statutes, not pursuant to a political choice by the Counties. The perfect pass on here also made the vertical apportionment of any alleged damages between the Counties and the end-users quite simple. Thus, *Carter* did not present the issue of whether indirect purchasers, who are *direct* victims of (and suffered harm proximately caused by) racketeering have RICO standing.[35]

RICO would be ill served and Article III's injury in fact requirement would be eliminated, by giving a remedy to the Counties, who could not be victims in any sense. This Court should therefore

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[33]The Sixth Circuit also relied upon *Terre Du Lac Ass'n, Inc.* v. *Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). However, in *Terre Du Lac*, the Eighth Circuit specifically noted that a perfect pass on did not occur, but only that some degree of passing on was possible. *Id.* at 473.

[34]This Court is reluctant to confer standing to sue on taxpayers in suits arising from political decisions by governmental actors, because of the taxpayers' small stake in litigation. *See Frothingham* v. *Mellon*, 262 U.S. 447 (1923); *United States* v. *Richardson*, 418 U.S. 166 (1974); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

[35]The Seventh Circuit in *Carter* was also wrong in its reading of *Hanover Shoe* and *Illinois Brick*, by stating that the rule in those cases is that "[t]he indirect purchaser recovers nothing, even if it bore the whole overcharge . . . . " 777 F.2d at 1175. Neither of these Supreme Court decisions addressed nor intimated the issue of standing where the *whole* overcharge was passed on. The Seventh Circuit some years later, in *Panhandle Eastern*, rejected the *Carter* court's narrow reading.

review this important question involving whether a civil RICO plaintiff who passed on 100 percent of any alleged harm from alleged racketeering activities would have suffered an injury in its business or property under section 1964(c) sufficient to confer standing.[36]

CONCLUSION

This petition for certiorari should be granted.

Respectfully submitted.

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**Counsel of Record*

July 13, 1989

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[36] Should this Court conclude that the pass on theory should be rejected in RICO actions, it must decide whether the cost-plus exception exists. *See Carter*, 777 F.2d at 1178 (rejecting the pass on theory for RICO, but recognizing a "controlled person" exception).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 86-1200/1217/18/66/67/68/1303/34

THE COUNTY OF OAKLAND,
Plaintiff-Appellant,
Cross-Appellee,

and

THE COUNTY OF MACOMB,
Intervening
Plaintiff-Appellant,
Cross-Appellee,

v.

THE CITY OF DETROIT, *et al.*,
Defendants-Appellees,

NANCY ALLEVATO, MICHAEL J. FERRANTINO, SR.,
WAYNE DISPOSAL, INC., CHARLES CARSON,
MICHIGAN DISPOSAL, INC.,
and WALTER TOMLYN,
Defendants-Appellees,
Cross-Appellants,

and

COLEMAN YOUNG, *et al.*,
Defendants-Appellees,
Cross-Appellants.

On Appeal from the United States District Court
for the Eastern District of Michigan

Decided and Filed January 27, 1989

Order on Denial of Rehearing and
Rehearing En Banc April 19, 1989

Before: MERRITT and NELSON, Circuit Judges, and CONTIE, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge. Oakland County, Michigan, brought a federal antitrust and RICO action against the City of Detroit and its mayor, among others, on account of alleged overcharges for sewerage services. Macomb County, Michigan, was allowed to intervene in the action as an additional party plaintiff.

The prices paid for the sewerage services were a function of the costs Detroit incurred in providing them. The plaintiff counties claimed that these costs were excessive, Detroit allegedly having procured sludge disposal services at inflated prices set in a price-fixing conspiracy, with enough padding to cover illegal kickbacks to city personnel. The complaints also alleged that the counties, as opposed to the City of Detroit, collected sewerage fees from municipalities located within sewage disposal districts operated by the counties, and the complaints alleged that Detroit was paid not by the local municipalities, but by the counties.

The district court dismissed the complaints on the ground that the counties lacked standing to sue. The counties were mere intermediaries, the court concluded, and the municipalities bore the full burden of the alleged overcharges when the municipalities paid the bills submitted to them by the counties. The counties thus could not show that they had suffered the sort of "injury in fact" necessary to confer standing under the Constitution, the district court held, just as they could not show that they had been injured in their "business or property" within the meaning of that phrase as used in the statutes on which suit was brought.

Both counties have appealed the dismissal of their complaints, and Oakland County has appealed an order denying

its motion to vacate certain protective orders entered in related criminal proceedings. The defendants have cross-appealed an order denying, in part, their motion to quash a subpoena for certain electronic surveillance materials.

Because we think that the plaintiff counties did allege injuries sufficient to give them standing to sue, we shall reverse the order of dismissal and direct that the complaints be reinstated. We think it would be inadvisable for us to try to resolve the various discovery issues at this stage of the litigation.

I

In 1977 the United States sued the City of Detroit in federal district court, alleging that Detroit was disposing of sewage in violation of federal environmental laws and regulations.[1] A consent judgment was entered, but the United States became dissatisfied with the pace at which Detroit was moving toward compliance. In March of 1979, following issuance of a show cause order, the court made Coleman A. Young, Mayor of the City of Detroit, the "administrator" of the wastewater treatment plant operated by the Detroit Water and Sewerage Department.

Invoking "the broad range of equitable powers available to this court to enforce and effectuate its orders and judgments," the district court transferred all functions relating to operation of the treatment plant to Mayor/Administrator Young, divesting Detroit's Board of Water

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[1]In the last nine years there have been no fewer than 14 published federal court opinions on matters arising out of the operation of Detroit's sewer system. The reader interested in the background is referred to *United States v. Bowers*, 828 F.2d 1169 (6th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1731 (1988); *City of Detroit v. State of Michigan*, 803 F.2d 1411 (6th Cir. 1986); and *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984).

Commissioners and the city water and sewerage department of authority vested in them under the city charter. The transfer of functions to Mr. Young was accompanied by a grant of what the order characterized as "extraordinary" powers, including the power to waive competitive bidding requirements in awarding contracts and the power to operate "without the necessity of any actions on the part of the Common Council of the City of Detroit. . . ." *United States v. City of Detroit,* 476 F.Supp. 512, 515 and 520 (E.D. Mich. 1979). The present appeal, like that in *County of Oakland v. City of Berkley,* 742 F.2d 289 (1984), draws in issue neither the validity of the court's appointment of Mr. Young as administrator nor the validity of the court's decision to vest in him powers which the city charter placed elsewhere. *Id.* at 292.

Acting in his capacity as administrator, Mr. Young entered into contracts for the hauling and landfill disposal of sludge and scum from the city's wastewater treatment plant. Various improprieties in the formation of these contracts allegedly increased the city's costs and its charges to the counties; those improprieties form the basis for the counties' action against the city, Mr. Young, the sludge haulers, and certain persons associated with them.

* * *

The Detroit sewage disposal system serves not only the city itself, but the outlying counties of Oakland and Macomb. Oakland County, according to the affidavit of its chief deputy drain commissioner, operates three sewage disposal districts embracing some 35 municipalities. The municipalities have individual sewer systems that are connected to interceptor sewers built and operated by the county. The county sewer lines are connected, in turn, to the Detroit system. Detroit treats the sewage at its wastewater treatment plant and arranges for disposal of the residual sludge and other byproducts of the treatment process. Detroit bills Oakland County for the services provided by the city, and Oakland County

bills the local municipalities. Detroit is entitled to be paid by Oakland County, as the affidavit establishes, whether or not the municipalities pay the county on time or in full.

The fees Oakland County charges the various municipalities within its three sewer districts are based upon the county's costs. These include costs incurred by the county under its contractual arrangements with Detroit, costs incurred in building, operating and maintaining the county system, and an allowance for reserves.

The allocation of costs among the municipalities is, for a number of reasons, less precise than it might be. The character of the information used in the allocation process varies widely from community to community, for one thing. In some areas there are no individual user meters and no master meters that accurately record the flow of sewage. Thus in the Clinton-Oakland district the allocation is based on estimated usage multiplied by a flat rate, adjusted by a "unit assignment factor." In the Evergreen-Farmington district the allocation for some municipalities is based on master water meters, while for others it is based on totals compiled from individual water meter readings, adjusted by a multiplier. Some Evergreen-Farmington communities have a separate storm water charge, while others do not. Some municipalities lie within two districts, while others lie wholly in one.

In addition to operating connecting sewers that link local municipal systems with the Detroit system, Oakland County is directly responsible for operation of the local sewer systems in four communities. The County is also a consumer of sewer services; all Oakland County buildings are connected to local municipal sewer systems in the communities where the buildings are located, and Oakland County receives and pays regular sewer bills like any other end-user in those communities.

The municipalities bill their individual residential and commercial customers under a procedure similar to Oakland County's. Each community that operates its own local system

allocates the county's charges among its customers, after adding an amount sufficient to cover sewer expenses incurred at the local level.[2]

* * *

Turning to the specific events out of which the counties' claims arise, the story begins in 1979, when Detroit was seeking new ways of disposing of sludge and scum from its wastewater treatment plant. On May 1 of that year Detroit signed a sludge disposal contract with defendant Michigan Disposal, a sludge-hauling firm owned by the late Michael Ferrantino. Mr. Ferrantino's estate is a defendant in this action. The contract, which covered only part of the output of the plant, was originally entered into for a term ending on June 30, 1983; the term was later extended to June 30, 1985.

The sludge handled under the Michigan Disposal contract was taken to a landfill owned by Wayne Disposal, another firm controlled by Ferrantino. Michigan Disposal paid Wayne Disposal for the right to use its landfill.

In 1980 Michigan Disposal made an unsolicited proposal for a second sludge-hauling contract, covering the balance of the output of Detroit's plant. The city rejected the proposal, believing that total dependence on a single sludge hauler would be bad policy. Mr. Ferrantino decided to try skinning the cat another way. With defendant Darralyn Bowers, who was a close friend of Mayor Young, Ferrantino contrived a scheme to procure the second sludge-hauling contract

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[2]Macomb County has not provided details similar to those furnished by Oakland County. We are told only that Macomb allocates Detroit's charges proportionately, based on meter readings, and adds a fixed markup. Macomb operates no facilities of its own. To the extent necessary we shall assume, as did the district court, that Macomb County's operations are otherwise similar to those of Oakland County. This does not foreclose the district court from treating the claims of the two counties differently should the facts adduced hereafter warrant it.

for a front company known as Vista Disposal. Also involved in the scheme were defendant Tomlyn, a Michigan Disposal employee, and defendants Cusenza and Valentini. The latter two individuals were employees of Wolverine Disposal, another firm partly owned by Mr. Ferrantino.

Vista Disposal, the front company, was held out as the sole proprietorship of one Jerry Owens, a man with no previous experience in the sludge hauling industry. Vista submitted a proposal to build a sludge holding pad where sludge could be stabilized and held for up to 12 hours at the treatment plant before being hauled away. The proposal included false statements about Vista's ownership, Owens' experience, and other matters. Mayor Young used his extraordinary court-conferred powers to award the contract to Vista without competitive bidding and without Common Council approval. A subsequent FBI investigation of the Vista scheme led to several of the present defendants being prosecuted and ultimately convicted under the Racketeer Influenced and Corrupt Organizations Act (RICO), the Hobbs Act, and the federal mail fraud statute.[3]

* * *

Oakland County, soon to be joined by Macomb County, filed the instant civil action in the wake of the criminal investigations. The counties alleged in their complaints that the

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[3]Given the nature of their crimes and the element in which these dabblers in sludge and scum worked, Shakespeare could almost have been speaking for the convicted defendants when he wrote, in Sonnet CXI,

> "O, for my sake do you with Fortune chide,
> The guilty goddess of my harmful deeds,
> That did not better for my life provide,
> Than public means, which public manners breeds.
> Thence comes it that my name receives a brand;
> And almost thence my nature is subdu'd
> To what it works in, like the dyer's hand. . . ."

defendants had conspired to violate the antitrust and racketeering laws, had excluded competition, had illegally fixed the price of sludge hauling, had monopolized the sludge hauling industry, and had imposed illegal overcharges. Relying on § 4 of the Clayton Act (15 U.S.C. § 15) and the cognate provision in RICO, 18 U.S.C. § 1964(c), the counties sought to recover their damages three-fold, along with costs and attorney fees. Each count of each complaint contained a paragraph alleging injury in terms comparable to those in the following exemplar, taken from paragraph 49 of the Oakland County complaint:

> "Plaintiff has been injured in its property and business, in that the charges collected by Detroit for the treatment and disposal of Oakland County's sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of [Detroit Wastewater Treatment Plant] sludge caused by Defendants' unlawful conduct."

Without answering the complaints, the defendants moved for dismissal under Rule 12(b)(6), Fed. R. Civ. P. In an opinion reported at 620 F.Supp. 1399, the district court granted the motions. Subsequent motions to alter judgment were denied (see opinion reported at 628 F.Supp. 610), and the counties have appealed. Separate appeals on discovery matters have been consolidated with the appeals relating to the dismissal of the action.

II

The district court, as noted above, dismissed the plaintiff counties' complaints for lack of standing. The burden of any unlawful cost increment fell on the municipalities or the ultimate consumers, the court reasoned, and although the counties did pay a portion of the allegedly excessive costs as

customers of the municipalities, the counties were not suing as customers of the municipalities, but as administrators of the "enterprise funds" through which the county sewage systems were operated. In the latter capacity, said the district court, the counties simply acted as collection agencies for the City of Detroit, in effect, and not as buyers of sewerage services on their own account. 620 F.Supp. at 1402-03; 628 F.Supp. at 613. The counties had not themselves suffered any injury in fact, the court concluded, and thus had no standing to sue. It seems to us, however, that the counties must be treated as buyers on their own account. As such the counties did have standing, we think, both as a matter of constitutional law and as a matter of statutory law.

Implicit in the district court's suggestion that it was not the counties which purchased the services from Detroit is the notion that the counties were acting merely as agents, rather than as principals—for the court expressly acknowledged that Oakland County, at least, did actually sign contracts with Detroit. 620 F.Supp. at 1400. *Cf.* 628 F.Supp. at 611. But the complaints—which must be accepted as true for present purposes—allege that it was the *counties*, not the municipalities acting through the counties as agents, that were the contracting parties. These allegations have been verified, in the case of Oakland County, by an uncontradicted affidavit attesting to the fact that "Oakland County has entered into three separate contracts with the City of Detroit for the disposal and treatment of the sewage flows originating within each of [the county's] three sewage disposal districts . . . ." It was the counties, not the municipalities, that were billed by Detroit, and there has been no showing that Detroit was entitled to look to the municipalities for payment. The counties, in our view, must be treated as direct purchasers in their own right.[4]

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[4]The counties seem to argue here, as they did in the district court, that "the Counties, the municipalities, and the end users are really one

It is true that in *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984), where we concluded that the pendent jurisdiction doctrine could be invoked in the federal government's environmental action to enable the federal court to decide a sewer charge dispute between Oakland County and the City of Madison Heights, we described Oakland County as "an intermediary only, dependent completely on payments from the municipalities to meet its obligation to Detroit." *Id.* at 292. We also said that "[s]ince Oakland County is a mere conduit for sewer charges owed to the City of Detroit the failure of any of the municipalities . . . to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal than was assumed and planned for in the consent judgment." *Id.* at 296. Whether or not the last part of the quoted statement is factually correct, however,[5] our 1984 opinion made it clear that "[i]n November 1962 *Oakland County* entered into a contract with the City of Detroit by which Detroit agreed to receive and dispose of sanitary and storm sewage . . . and the *County* agreed to a schedule of payments for this service." *Id.* at 291-92 (emphasis supplied). Our opinion also made it clear

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party contracting with the City of Detroit." 628 F.Supp. at 613. The district court dismissed this argument as an "absurdity," and we agree. It is somewhat reminiscent of the old common law proposition that a man and his wife are one person, the husband being that person.

[5]In the case at bar, Defendant Young filed a brief with the district court attaching as exhibits certain contracts entered into by the City of Detroit, through its Board of Water Commissioners, and Oakland County; the contracts provide that "[t]he COUNTY shall pay the BOARD for sewage treatment and disposal service at such rates as the BOARD may establish from time to time." We have seen in these contracts no indication that the counties would be relieved of responsibility for paying Detroit to the extent that the counties might be unable to collect from the municipalities. The district court recognized in this case that a failure of the municipalities to pay "their contractual obligations to the Counties" would injure the enterprise funds maintained by the *counties*. 628 F.Supp. at 612.

that service charges were imposed on the municipalities *by the county*; it was a dispute over the amount of the *county's* charges, after all, that was before us in that case.

Our 1984 decision undoubtedly reflected an understanding that 100 percent of the charges imposed by Detroit on the county were passed on by the county to the municipalities, which would make the county a "conduit" in an economic sense. The decision did not say, however, that the county was an agent rather than a principal in the legal sense. Accordingly, in our view, Oakland County is not collaterally estopped from challenging the district court's suggestion that the counties are not actual buyers of the service sold by Detroit. The counties certainly are buyers, as we see it, and the real question presented here is whether the Constitution or the statutes foreclose the counties from coming into court if one assumes—as we do, for purposes of this opinion—that any and all overcharges were passed on to the counties' own customers, the municipalities.

A

We shall address the constitutional question first. The Constitution makes it clear that the judicial power vested in the federal courts under Section 1 of Article III extends only to "Cases" and "Controversies." U.S. Const., Art. III, § 2. A dispute in which the interest of the complaining party is purely academic does not qualify as a case or controversy in the constitutional sense; the federal courts are not empowered to decide questions posed by officious intermeddlers having no personal stake in the outcome. To satisfy the "case or controversy" requirement of the Constitution, a complaint must describe some actual or threatened injury to the complainant, must allege a causal connection between that injury and the defendant's putatively illegal conduct, and must advance some legally cognizable claim for redress. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

A buyer who is induced to pay an unlawfully inflated price for goods or services obviously suffers an actual injury—an "injury in fact," to use the common expression. As Mr. Justice Holmes put it in discussing the antitrust complaint of a city that claimed to have been overcharged on purchases of pipe for its water mains, "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906) (majority opinion).

Does the injury suffered by such a person vanish if he is able to recoup the illegal overcharge by passing it on to his own customers? The answer is not difficult, at least insofar as the constitutional aspect of the question is concerned. Just such an issue was present in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), and in that case Mr. Justice Holmes—speaking this time for a unanimous Supreme Court—said in effect that the plaintiff who has subsequently passed on the overcharge to his customers is no more deprived of standing to sue than is the claimant whose loss happens to be covered by insurance. *Id.* at 534.

Presented with a similar question in *Adams v. Mills*, 286 U.S. 397 (1932), the Supreme Court (per Brandeis, J.) gave a similar answer. That case was brought by commission merchants who, as consignees of livestock shipped by rail, had been charged illegal unloading fees. The commission merchants sued to recover the unlawful charges notwithstanding that they had already reimbursed themselves out of the proceeds of the sale of the livestock, remitting to their principals only the balance remaining after deduction of the unloading fees. If the defendants exacted an unlawful charge from the plaintiffs, Mr. Justice Brandeis said in explaining why the action would lie,

> "the exaction was a tort, for which the plaintiffs were entitled, as for other torts, to compensation from

> the wrongdoer. Acceptance of the shipments would have rendered them personally liable to the carriers if the merchandise had been delivered without payment of the full amount lawfully due. As they would have been liable for an undercharge, they may recover for an overcharge. In contemplation of law the claim for damages arose at the time the extra charge was paid. Neither the fact of subsequent reimbursement by the plaintiffs from funds of the shippers, nor the disposition which may hereafter be made of the damages recovered, is of any concern to the wrongdoers."

Id. at 407 (citations omitted).

Like the Holmes opinion, on which it relied, the Brandeis opinion rejected the argument that the plaintiffs had not been "injured" within the meaning of the applicable statute. Article III was not discussed, but the conclusion that the plaintiffs had been "injured" in the statutory sense necessarily presupposed that the injury was enough to give the plaintiffs the standing required under Article III; if the Court had not believed there was a case or controversy, it could not properly have remanded the matter, as it did, with directions to enter judgment for the plaintiffs. The Court was subsequently to say, indeed, that whether the plaintiff has made out a case or controversy "is the threshold question in every federal case. . . ." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Holmes and Brandeis may have been influenced by concepts of privity that have lately passed out of fashion, but this cannot be said of the court that recently decided *Bacchus Imports v. Dias*, 468 U.S. 263 (1984). The plaintiffs in *Dias* were wholesalers who sought to challenge the constitutionality of an excise tax imposed by the State of Hawaii on wholesale sales of liquor. The plaintiff wholesalers added the full amount of the tax to the full amount of the wholesale prices; the plaintiffs' customers, who were licensed retailers, were

charged the wholesale price plus tax. The state argued that the wholesalers had no standing to challenge the tax because they had not shown that the tax inflicted any "economic injury" on the wholesalers. The Supreme Court rejected this argument out of hand, declaring that the plaintiff wholesalers "plainly" had standing to challenge the tax. *Id.* at 267. (The basis of the challenge was that certain locally produced liquors had been exempted from the tax, with the result that the tax arguably discriminated against interstate commerce.)

The *Dias* court gave two reasons for concluding that the plaintiff wholesalers had shown an injury sufficient to give them standing to contest the constitutionality of Hawaii's tax. In the first place, the Court pointed out,

> "[t]he wholesalers are . . . liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills." *Id.*

"Furthermore," the Court said,

> "even if the tax is completely and successfully passed on, it increases the price of [the wholesalers'] products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business." *Id.*

Both of these observations seem pertinent to the situation presented in the case at bar. The plaintiff counties were liable for Detroit's allegedly inflated sewerage charges, just as the plaintiff wholesalers in *Dias* were liable for Hawaii's allegedly unconstitutional tax, whether or not the plaintiffs' customers paid their bills. Even if the plaintiff counties were successful in passing on all of the costs allocated to them, moreover, we see no constitutional impediment to their litigating the issue (assuming it is even relevant) of whether excess costs attributable to the defendants' misconduct had an adverse impact on the counties' "business."

The counties may not have been in competition with others for the sale of sewer services, but surely these counties were in competition with other counties in attempting to attract and retain people and/or industry and commerce. We are not prepared to assume that the availability of cost-effective sewer services cannot affect decisions on where houses will be built, where commercial and industrial enterprises will be located, and where taxpayers will choose to live. The district court believed that "supply and demand do not interact" in this situation because the counties are the only source of sewer services within their respective jurisdictions, 628 F.Supp. 613, but this overlooks the fact that no one is required to live or set up shop in Oakland or Macomb County; there are plenty of other counties in the United States. See *Carter v. Berger*, 777 F.2d 1173, 1177 (7th Cir. 1985). It would clearly be wrong for us to conclude at the outset of this litigation, based merely on the pleadings and Oakland County's affidavit, that the counties could not possibly have suffered any injury in fact as a result of having been overcharged by the City of Detroit. Much of the relevant caselaw, indeed, seems to treat the imposition of an unlawfully inflated price on a direct purchaser as an injury *per se*. Nothing in the Constitution requires us to hold that the counties lack standing to sue.

B

In terms variously described as "broad" (*Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 529 (1983)), "expansive" (*Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982)), and "sweeping" (*Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1081 (6th Cir. 1983)), section 4 of the Clayton Act, as codified at 15 U.S.C. § 15, provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover

> threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

A cognate provision in RICO, codified at 18 U.S.C. § 1964(c), provides that:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee "

Are the plaintiff counties proper parties to bring private antitrust and RICO actions under these statutory provisions? We believe they are.

It is not to be gainsaid that the counties are "persons" within the meaning of the antitrust laws. *Chattanooga Foundry v. Atlanta, supra,* 203 U.S. at 396. If they have not been injured in their "business" of furnishing sewer service, moreover, the counties at least sustained an injury in their property when they paid the allegedly excessive charges. *Id.* That injury, as we have seen, was not eradicated for constitutional standing purposes if the excessive charges were subsequently passed on to the counties' municipal customers—and such a passing on of illegal charges does not normally wipe out the injury for antitrust standing purposes either.

In the leading case of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), where the Supreme Court emphatically rejected an antitrust defendant's argument that the plaintiff could have suffered no legally cognizable injury from illegal overcharges that were reflected, in turn, in the prices charged by the plaintiff to its own customers, the Court held that "when a buyer shows that the price paid by him [in a chain of distribution situation] is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4." *Id.* at 489. Justice White's majority opinion in

Hanover Shoe cited *Chattanooga Foundry v. Atlanta, Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, and *Adams v. Mills* with obvious approval, 392 U.S. at 489-90, and while the opinion noted that some lower courts had sustained the "so-called" passing on defense, it pointed out that "[o]thers, beginning with Judge Goodrich's 1960 decision in the case before us, deemed it *irrelevant* that the plaintiff may have passed on the burden of the overcharge." *Id.* at 490 n. 8 (emphasis supplied).

Judge Goodrich (a highly respected circuit judge who sat as a district court judge in the *Hanover Shoe* litigation) concluded that the "excessive price is the injury." 185 F.Supp. 826, 829 (M.D. Pa. 1960). Justice White explained that it was unnecessary, in Judge Goodrich's view, to determine whether plaintiff Hanover had passed on the illegal burden to the next group in the chain of distribution, "because Hanover's injury was complete when it paid the excessive rentals and because ' "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step" ' and to exonerate a defendant by reason of remote consequences. *Id.* at 830 (quoting from *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533, 62 L.Ed. 451, 454, 38 S.Ct. 186 (1918))." 392 U.S. at 488 n. 6, quoting 185 F.Supp. at 830.

The Supreme Court stressed two reasons, in *Hanover Shoe*, for its decision to reject Hanover's assertion of a "passing on" defense. First, proper application of such a defense would entail proof of "virtually unascertainable figures," showing precisely what prices would have prevailed had the overcharges not occurred, what effect price changes would have had on sales, and so on. 392 U.S. at 493. Second,

> "[I]f buyers [were] subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers,

> in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness."

392 U.S. at 494. (Emphasis in original.)

In the subsequent case of *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977), the Supreme Court, again speaking through Justice White, rejected an attempt by indirect purchasers to make offensive use of the "passing on" concept. In holding that the indirect purchasers could not sue to recover the overcharges passed on to them by a middleman, the Court reinforced the construction that *Hanover Shoe* had given § 4 of the Clayton Act. Under that construction, as the Court explained, "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the section. . . ." *Id.* at 729. In the case at bar, of course, this construction of § 4 points to the conclusion that the overcharged county, and not any municipality or ultimate consumer, is the party injured in its business or property within the meaning of § 4.

It was the "evidentiary complexities and uncertainties" involved in applying the pass-on concept that seems to have been most influential in bringing the Supreme Court to "the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharges in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois*

Brick, 431 U.S. at 732, 735. Acceptance of the pass-on approach, the Court warned, "would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Id.* at 740. Efforts to apportion the recovery among everyone who could have absorbed part of the overcharge "would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Id.* at 737.

The *Illinois Brick* court did concede that the difficulties and uncertainties it foresaw would "be less substantial in some contexts than in others." 431 U.S. at 743. In this connection the plaintiffs had argued—with some lower court support—"that pass-on theories should be permitted for middlemen that resell goods without altering them and for contractors that add a fixed percentage markup to the cost of their materials in submitting bids." 431 U.S. at 743. Just such a factual situation had been presented in *Obron v. Union Camp Corp.*, 477 F.2d 542 (6th Cir. 1973), *aff'g* 355 F.Supp. 902 (E.D. Mich. 1972)—and this court, in a brief *per curiam* decision, had accepted the pass-on defense in that case. (The plaintiff in *Obron* was a middleman who purchased mesh bags from defendant Union Camp at a fixed percentage off Union Camp's suggested list price; the middleman then resold at list to customers who took delivery of the bags, without alteration, in "drop shipments" from Union Camp.)

In a passage that implicitly repudiated our *Obron* decision, the *Illinois Brick* court rejected the argument that pass-on theories should be permitted for middlemen reselling goods without alteration and for contractors adding a fixed percentage markup:

> "We reject these attempts to carve out exceptions to the Hanover Shoe rule for particular types of markets.
>
> * * *

> An exception for the contractors here on the ground that they purport to charge a fixed percentage above their costs would substantially erode the Hanover Shoe rule without justification."

431 U.S. at 744 (footnote omitted).

Although *Obron* itself would doubtless have been decided differently had it reached us after the Supreme Court's decision in *Illinois Brick*, both *Illinois Brick* and *Hanover Shoe* recognized the possibility that there "might" be situations of a different sort where the considerations requiring rejection of the pass-on defense would not be present. Thus a pass-on defense "might" be permitted, the Supreme Court said, "when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged. . . ." 392 U.S. at 494; 431 U.S. at 724 n. 2.

In the case at bar the district court thought that if the counties could be said to be buyers at all, their arrangements with the municipalities constituted, "in essence," pre-existing cost-plus contracts. 628 F.Supp. at 613. Relying in part on our observation in *County of Oakland v. City of Berkley*, 742 F.2d 289, 296 (6th Cir. 1984), that Oakland County was "a mere conduit" through which payment of charges allocated to the municipalities flowed into the coffers of the City of Detroit, the district court decided that it was "easy to prove" that the plaintiff counties had not been damaged. Accordingly, the court concluded, even if the counties could meet the standing requirement, the cost-plus contract exception to the *Hanover Shoe* rule ought to be invoked. 620 F.Supp. at 1402-03.

Mindful, as we were in *Jewish Hospital Assn. v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 975 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981), "of the *Illinois Brick* Court's emphasis upon the narrow scope of exemptions to the indirect-purchaser rule," we are not persuaded that a cost-plus contract exception, assuming it exists, precludes the

direct purchaser from maintaining suit in the case at bar. To allow the passing on defense in this particular case, we believe, would invite precisely the sort of complexities, uncertainties, and other untoward consequences that the indirect purchaser rule was designed to avoid.

We are not dealing here with a situation in which an antitrust violator has sold a single item to a single middleman who has resold the item under a pre-existing cost-based contract to a single consumer. In a situation of that sort it might well be easy to prove that the burden of the overcharge had been borne solely by the consumer—and in the absence of other consumers, there could not be any problem in determining how to allocate the overcharge at the consumer level.

In the present situation, by contrast, our hypothesis must be that Detroit sold sewerage services, at inflated prices, to counties that resold the services to scores of municipalities; that the counties attempted to pass their costs on to the municipalities under a confusing array of formulae based partly on actual meter readings and partly on estimates; and that the municipalities attempted, in turn, to pass their costs on to thousands of consumers under similar formulae. If both the counties and the municipalities were 100 percent successful in passing all of the overcharges on to the consumers, the logic of the pass-on theory is that the appropriate plaintiffs in this case are not a few dozen municipalities, but thousands of individual householders, businesses, and other consumers. See *Hanover Shoe*, 392 U.S. at 494. "The fact is," as the district court observed in the present case, "that the end users, because they have no one to whom they can pass on their costs, are the ultimately injured party." 628 F.Supp. at 612.

For the antitrust violators to be held answerable in damages at all, under the pass-on approach, this case would thus have to be transformed into a massive class action on behalf of a huge group of remote consumers, with or without the municipalities and the counties as additional plaintiffs. The

task of determining the actual amount of each individual class member's actual damage would present enormous "evidentiary complexities and uncertainties," to borrow a phrase from *Illinois Brick*, if it would not entail proof of what *Hanover Shoe* called "virtually unascertainable figures."

The risk in adopting the pass-on approach, it seems to us, is not so much that consumers having only a tiny stake in the lawsuit would have "little interest in attempting a class action," *Hanover Shoe*, 392 U.S. at 494, but that self-appointed representatives of the class would have all too much interest in attempting such an action. The net result of our approving the pass-on approach, assuming the class representatives and their counsel would resist the temptation to settle the case for too little, could well be protracted and hard-to-manage class litigation generating large attorney fees, but not necessarily doing much good for any particular individual who did not happen to be a lawyer for the plaintiff class. See *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985). "The class action and the entrepreneurial lawyer may be the best possible solution to some legal problems," *id.*, but we think the solution of choice for the problem at hand is the solution endorsed by Holmes and Brandeis and White, JJ.: "concentrating the full recovery for the overcharge in the direct purchasers rather than ... allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois Brick*, 431 U.S. at 735.

We are strongly confirmed in this judgment by the Supreme Court's post-*Illinois Brick* decision in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983). That decision, as we indicated in *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085-86 (6th Cir. 1983), directs us "to consider the § 4 inquiry on a case by case basis," applying the factors that historically have "circumscribe[d] and guide[d] the exercise of judgment in deciding whether the law affords a remedy in specific

circumstances." 459 U.S. at 537. The "factors" mentioned in Justice Stevens' majority opinion in *Associated General Contractors* weigh heavily in favor of concentrating the full amount of any recovery in the counties—where the recovery would, presumably, redound to the benefit of the counties' residents, most of whom presumably would have been ultimate consumers of the allegedly overpriced sewerage services.[6]

The first of the factors that favored judicial recognition of the plaintiff's antitrust claim in *Associated General Contractors* obviously favors recognition of the counties' claims here; in this case, as in *Contractors*, "[t]he complaint does allege a causal connection between an antitrust violation and harm to the [plaintiff] and further alleges that the defendants intended to cause that harm." 459 U.S. at 537.

Although an allegation of improper motive "is not a panacea that will enable any complaint to withstand a motion to dismiss," this factor "may support a plaintiff's damages claim under § 4. . . ." 459 U.S. at 537 (footnote omitted). It is hard to imagine how improper motives could be alleged any more clearly than they have been in this case.

The next factor on which Justice Stevens found it appropriate to focus in *Contractors* is "the nature of the plaintiff's alleged injury." 459 U.S. at 538. The injury claimed by the plaintiff counties in the instant case is a classic example of precisely the sort of injury with which the antitrust laws were intended to deal; the prices the counties had to pay, according to the complaints, were higher than they would have been

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[6]The district court saw no reason why the end users would benefit if the counties' enterprise funds were replenished through a recovery in this litigation. 628 F.Supp. at 613. As we understand it, however, the funds are strictly non-profit, so any recovery would ultimately have to be passed through to the end users via charges lower than those that would otherwise be imposed.

had the defendants not broken the law. The fact that the counties' injury, like the injury alleged by the plaintiff in *Blue Shield v. McCready*, 457 U.S. 465, 483 (1982), "was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws" is a factor that may in itself be "controlling." *Contractors*, 459 U.S. at 538. *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977).

"An additional factor," *Contractors* says, "is the directness or indirectness of the asserted injury." 459 U.S. at 540. As direct purchasers, the counties obviously assert a direct injury.

The state of the law at the time the antitrust statutes were initially adopted makes the direct injury a particularly significant factor. The substance of § 4 of the Clayton Act, as Justice Stevens pointed out in *Contractors*, 459 U.S. at 530, was originally enacted in 1890 as § 7 of the Sherman Act, and "[t]he repeated references to the common law in the debates that preceded the enactment of the Sherman Act make it clear that Congress intended the Act to be construed in the light of its common-law background." *Id.* at 531 (footnote omitted). The doctrine of privity of contract—specifically mentioned in *Contractors* at 459 U.S. 533—was in its heyday in 1890, and *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (quoted in *Contractors* at 459 U.S. 534) stated a truth with which lawyers practicing in 1890 would have been totally comfortable when it said that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." The generation of which Senator Sherman and Mr. Justice Holmes were both members would have been unsympathetic to the view that the City of Detroit could be sued for damages, in a situation such as that presented here, by any entity with which the city did not have a direct contractual relationship.

The damages claim of the plaintiff in *Contractors* was found to be "highly speculative," a factor that cut against rec-

ognition of the plaintiff's action. 459 U.S. at 542-43. The claims of the counties in the case at bar, on the other hand, are obviously less speculative than the claims of remote consumers who, unlike the counties, may have had their individual charges computed on the basis of estimates and arbitrary formulae.

The next factor identified in *Contractors*—"the strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits," 459 U.S. at 543—is one we have already addressed. A straightforward action by Oakland and Macomb counties alone would obviously be more manageable than a class action brought on behalf of thousands of remote consumers whose individual claims would present extraordinary complexities. If "the risk of duplicate recoveries" is minimal in this case, "the danger of complex apportionment of damages" (459 U.S. at 544) certainly is not. The task of making a proper allocation and distribution of any recovery to thousands of end users would be a formidable one, particularly in view of the frequency with which modern Americans change their places of residence.

Although we have focused primarily on the antitrust laws in the foregoing discussion, most of what we have said is applicable also to the treble damage provision of RICO, 18 U.S.C. § 1964(c), a provision patterned directly on § 4 of the Clayton Act. If the counties are the proper parties to sue for damages allegedly arising out of violations of the antitrust laws, it seems clear that the counties are also the proper parties to sue for damages allegedly arising out of RICO violations. See *Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985), and *Terre Du Lac Association v. Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). Under both statutes, on the facts that we are required to assume here, the counties are indeed the proper parties to bring suit. The complaints should not have been dismissed.

III

The various recovery issues raised by the parties are entirely unrelated to the standing issue, and both the protective order from which Oakland County appeals and the order denying in part a motion to quash various subpeonas, from which certain defendants cross-appeal, are interloctuory orders that would not ordinarily be immediately appealable. Indeed, we have previously dismissed attempts to take immediate appeals from these very orders. We think it would be premature to undertake appellate review of the discovery orders before the case is even at issue.

The order granting the defendants' motion for summary judgment is **REVERSED,** and the case is **REMAINED** for further proceedings consistent with this opinion.

ORDER

BEFORE: MERRITT and NELSON, Circuit Judges, and CONTIE, Senior Circuit Judge.

The court having received the defendants' various petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on any of the three suggestions for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

After receipt of the petitions for rehearing, we requested that petitioner City of Detroit furnish a record citation for a purported contract that was quoted and relied on heavily in the city's petition for rehearing. The city conceded that the contract was not part of the record, but the city moved to enlarge the record by adding both the contract quoted in the petition for rehearing and a later contract. The plaintiffs have responded in opposition to the motion.

The city had ample opportunity to present this evidence in a timely manner in the district court. It did not do so. Neither did the city move to correct or modify the record pursuant to Fed. R. App. P. 10(e) at the time this case was originally heard. The attempt to change the record after an adverse decision had been rendered by the court of appeals simply came too late. See generally 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and*

Procedure § 3956 (1977). The City of Detroit's "motion to add documents to record" is **DENIED**.

If we had been prepared to accept the tendered contracts, it would not have led us to grant rehearing in this case. In our original opinion we assumed, for purposes of the opinion, "that any and all overcharges were passed on to the counties' own customers, the municipalities." Slip op. at 11. The contracts simply confirm what we had already assumed.

The contracts in question do not affect the constitutional standing issue. The initial purchaser in a chain of distribution does not lack standing in a constitutional sense if charges are passed down the line. As we noted in our original opinion,

> "[e]ven if the plaintiff counties were successful in passing on all the costs allocated to them, . . . we see no constitutional impediment to their litigating the issue (assuming it is even relevant) of whether excess costs attributable to the defendants' misconduct had an adverse impact on the counties' 'business.'" Slip op. at 14.

The question of whether a plaintiff has standing to sue under the antitrust laws depends largely on prudential considerations, including the importance of construing the antitrust laws in a way that preserves the effectiveness of the private antitrust action and furthers the orderly administration of justice. If the counties are not appropriate plaintiffs because they passed their costs on to municipalities, surely the municipalities, which in turn passed their costs on to individual residential and commercial customers, are not appropriate plaintiffs either. We continue to believe that "[e]fforts to apportion the recovery among everyone who could have absorbed part of the overcharge 'would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.'" Slip op. at 16 (quoting *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720, 737 (1977)).

Furthermore, the *Illinois Brick* Court's observation that a cost-plus contract exception "might be permitted" was limited to contracts for a fixed quantity. 431 U.S. at 736. Although at least one court has been prepared to read the cost-plus exception more broadly in cases involving offensive use of a pass-on theory, see *State of*

Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co., 852 F.2d 891 (7th Cir. 1988) (en banc), *cert. denied*, ___ U.S. ___, 102 L.Ed.2d 573 (1988), we do not think the purposes of the antitrust laws would be well served by reading the cost-plus contract exception so broadly in a case involving the defensive use of the pass-on theory.

We have also reviewed the petitions for rehearing filed by the other defendants, and we conclude that all of the questions addressed in those petitions were fully considered upon the original submission and decision of this case. The petitions for rehearing are **DENIED**.

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. MICHIGAN, S.D.

Civ. A. No. 84-1068

COUNTY OF OAKLAND, by GEORGE W. KUHN,
the Oakland County Drain Commissioner,
Plaintiff,

and

COUNTY OF MACOMB, by THOMAS S. WELSH,
the Macomb County Public Works Commissioner,
Intervening Plaintiff,

v.

The CITY OF DETROIT, COLEMAN A. YOUNG,
CHARLES BECKHAM, NANCY ALLEVATO,
as Personal Representative for the Estate of
MICHAEL FERRANTINO, DARRALYN BOWERS,
SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON,
WALTER TOMYN, VISTA DISPOSAL, INC.,
MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC.,
WOLVERINE DISPOSAL, INC.,
AND WOLVERINE DISPOSAL-DETROIT, INC.,
Defendants.

Oct. 31, 1985

MEMORANDUM OPINION

SUHRHEINRICH, District Judge.

Facts[1]

Oakland County enters into contracts with the City of Detroit and the Detroit Water and Sewerage Department (DWSD) for the transportation, treatment, and disposal of sewage. The work is performed by the Detroit Waste Water Treatment Plant (DWWTP). Detroit charges Oakland County according to the costs incurred by Detroit in providing the treatment and disposal service. Oakland County, in turn, collects revenues from its municipalities and pays Detroit.

The United States, in 1977, brought a civil action against Detroit and DWSD for violation of federal laws regulating discharge of pollutants. The parties entered into a consent judgment in which the defendants agreed to comply with the federal regulations by upgrading DWWTP. Mayor Young was appointed administrator of the DWWTP to speed up compliance.

Prior to 1979, sludge removed from sewage had been incinerated or discharged into the Detroit River. After 1979, because of the consent judgment, increasing amounts of sludge were required to be disposed of. As a result, Detroit entered into a contract with Michigan Disposal, owned by defendant Ferrantino, for hauling and disposal by landfill. As increasing amounts of sludge were needed to be disposed of, DWSD realized another contract would be necessary.

Michigan Disposal submitted an unsolicited proposal to increase its volume of disposal. DWSD rejected the proposal. Thereafter, Ferrantino and Michigan Disposal decided to establish a front company that would hide the interest of Ferrantino and Michigan Disposal to secure the second sludge disposal contract. Bowers, confidant of Young and Beckham, agreed to advance the scheme that was set forth. Ferrantino, Bowers, Tomyn, Cusenza, Valentini and Owens agreed to form the front company to be known as Vista Disposal Inc., which Owens would falsely hold himself out as owning.

1. This section discusses the facts as *alleged* in the complaint. These are by no means findings of fact.

On May 9, 1980, Vista submitted to Beckham its hauling and disposal proposal. Bowers, using her influence as friend of Young and Beckham, tried to speed the consideration and grant the proposal. Young and Beckham agreed to grant the proposal. At the time they did so, they knew or should have known that Vista was a mere front company.

Beckham announced to David Fisher, an employee of DWSD, that he wanted the Vista proposal implemented. Fisher advised Beckham that Detroit was obligated to permit public bids on such contracts, and to award the contract to the lowest qualified bidder. Beckham rejected this procedure and instead merely requested Requests for Qualifications. DWSD, through Beckham, then notified Vista that it had been selected.

Carson, Vista's attorney, negotiated the terms of the contract with the City. Bypassing the City Council, Young, purportedly acting under his authority as Administrator of DWWTP, approved the contract. Thereafter, Bowers paid money to Beckham for his aid and influence. Vista then entered into a joint venture with Wolverine-Detroit to perform the contract.

Based upon the above allegations, plaintiffs brought three charges. Counts I and II charge violations of the Sherman Act. Counts III-VII charge violations of RICO. Last, Count VIII charges Coleman Young with Breach of Fiduciary Duty.

Motions to dismiss have been filed as to each Count. For the reasons stated below, the motions are granted.

Antitrust Counts

Defendants have brought motions to dismiss plaintiffs' antitrust counts for several reasons. The threshold issue which must be addressed is that of standing. The action alleges in Counts I and II that defendants violated the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1973), by fixing the price for disposal sludge, excluding competition for disposal sludge, and monopolizing the hauling and disposal of sludge. The Counties have not sued as *parens patriae* on behalf of their citizens because Congress has specifically delegated this power to the various State Attorney Generals. Rather, the Counties maintain that they, themselves, were injured by defendants' actions as direct purchasers.

Plaintiffs allege that they were injured in that the charges collected by Detroit for the treatment and disposal of their sewage have been unlawfully inflated as a result of defendants' antitrust violations. Defendants maintain that plaintiffs have suffered no injury because any inflated sums are collected from the individual municipalities, i.e., they are "passed on" to the customer. This "passing on" defense arises where a middleman sues the seller of a good or service for an antitrust violation. The defense provides that the middleman is not injured because it passes on any inflated prices to the consumer and the middleman has no standing as it has no loss. It is axiomatic that the Constitution requires that plaintiffs must allege an "injury in fact" to have standing to sue. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). Further, standing requirements must be affirmatively pled in the complaint. *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

The leading case on the "passing on" defense is *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). In *Hanover*, the court found that United Shoe had violated section 2 of the Sherman Act by virtue of its leasing of and refusing to sell certain shoe machinery which, in turn, caused inflated prices to Hanover Shoe. United Shoe attempted to assert the "passing on" defense against Hanover Shoe, alleging that Hanover merely passed on any inflated prices to its customers.

The court rejected the "passing on" defense in that case, noting that so long as Hanover Shoe paid more than it should, its profits were lower than they would have been without the illegal activity. Although the court in *Hanover* severely restricted the "passing on" defense, it did not abandon it. The court said:

> We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing on defense not be permitted in this case would not be present. *Id.* at 494, 88 S.Ct. at 2232.

Thus, the "passing on" defense, though limited, is still viable in certain situations.

The Sixth Circuit analyzed the "passing on" defense in *Obron v. Union Camp Corporation*, 477 F.2d 542 (6th Cir. 1973). The court of appeals adopted Honorable Philip Pratt's memorandum opinion at 355 F.Supp. 902 (E.D.Mich.1972). In *Obron*, the defendant, Union Camp, manufactured mesh bags used by produce packagers. Obron, a distributor of these bags, would obtain an order form a customer and then submit it to Union Camp. The bags were sent directly from Union Camp to the customer. Union Camp would then bill Obron at 5% under list price and Obron would bill the customer at the list price. Obron sued Union Camp for Sherman Act violations arising out of the enforcement of an invalid patent.

In allowing the use of Union Camp's "pass on" defense, the district court said, "the crucial issue here is whether the circumstances of the case create a situation where it would be easy to prove that an overcharged buyer has not been damaged". 355 F.Supp. at 906. The court held that the contract was so strikingly similar to a pre-existing cost plus contract that the defense would be allowed. Obron, rather than being injured by defendant's actions, actually profited from them because it recovered, in effect, a sales commission percentage of the cost. Obron had no control over what price was charged customers. Thus, the reasoning of *Hanover*, that plaintiffs could have charged the inflated price without the higher cost and, thus, increased their profits, was inapplicable.

The issue in this case is whether the circumstances are such that proof that any overcharged buyers (i.e., the Counties) have not been damaged is easy to prove. To determine this, an analysis of the contractual relationships involved is necessary. As discussed in paragraph 20 of Plaintiff Oakland County's Complaint:

> Detroit charges Oakland County according to the cost incurred by Detroit in providing the treatment and disposal service. Oakland County, in turn, collects revenues from municipalities within each district and pays Detroit.

The same type of relationship is discussed in paragraph 20 of Macomb County's Complaint.

This relationship was described by the Sixth Circuit in *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984). In that case, Oakland County, which was responsible for collecting charges

from the municipalities that used the City of Detroit's sewage disposal system, brought suit against Berkley for declaration of amounts owed by it. In discussing the contract between the County of Oakland and the City of Detroit in which the City of Detroit agreed to receive and dispose of sanitary and storm sewage from the municipalities involved, the court held: "Oakland County served as an intermediary only, depending completely on payments from the municipalities to meet its obligation to Detroit". *Id.* at 292. Further, the court held that: "Since Oakland County is a *mere conduit* for sewer charges owed to the City of Detroit the failure of any of the municipalities . . . to pay the charges allocated to them would *result in Detroit's receiving less money* for sewage disposal than was assumed and planned for. . . ." *Id.* at 296 (emphasis added).

In applying the relationship of the parties to the law concerning the "passing on" defense, it becomes clear that the plaintiffs have not alleged the requisite damages to maintain standing in this matter. The Counties sustain no injury because they are only an intermediary. Thus, they derive no profit level which could be injured by the defendants' actions. In effect, the Counties are not really passing on inflated prices to the municipalities because they are not buyers of the service. Rather, the allegedly inflated prices are aimed directly at the municipalities and the Counties merely collect the sums necessary to pay those charges. The Counties are, in a sense, mere collection agencies. The Court, therefore, holds that the Counties do not allege facts sufficient to meet the Constitutional standing requirement of an "injury in fact". There is nothing in the complaints indicating that they suffer an injury.

Further, from a theoretical standpoint, this is a perfect example of when the exception to the *Hanover Shoe* ____ should be invoked.[2] The Court's reasons in *Hanover Shoe* for allowing a middleman to recover without deduction for "passing on" were the difficulties of the calculation of the overcharge to all the affected customers and the discouragement to the ultimate consumer's suit where he is too

2. See E. Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 Wm. & Mary L.Rev. 883 (1975); R. Harris & L. Sullivan, *Passing on the Monopoly Overcharge; a Comprehensive Policy Analysis*, 128 U.Pa.L.Rev. 269 (1979).

little affected to sue. Neither of these problems is present here. Since the municipalities are charged directly for the services rendered, it is no more difficult to trace any overcharges if the consumers (the municipalities) sue than if the Counties sue. Further, if the allegations are true, the municipalities have been significantly affected; thus, there is sufficient incentive for them to sue.

Aside from this inquiry into whether or not there is Constitutional standing, there is a separate inquiry whether the plaintiffs have standing under section 4 of the Clayton Act. As the Supreme Court noted in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983):

> Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a *further* determination whether the plaintiff is a proper party to bring a private antitrust action.

Id. 103 S.Ct. at 907 (emphasis added). So even assuming that plaintiffs had alleged sufficient "injury in fact" for constitutional purposes, and this Court holds that they have not, they would have only cleared the first hurdle. They would also need to show standing as a matter of antitrust law. As interpreted by the Sixth Circuit in *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983), the factors to be considered in determining antitrust standing are:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused;
>
> (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;
>
> (3) the directness or indirectness of the injury, and the related injury of whether the damages are speculative;
>
> (4) the potential for duplicative recovery or complex apportionment of damages; and
>
> (5) the existence of more direct victims of the alleged antitrust violation.

Id. at 1085. In *Southaven*, it was alleged that defendant Malone intentionally monopolized the food market industry in its local geo-

graphic area. When defendant became aware that plaintiff had a tenant prepared to immediately compete in the relevant grocery market, it refused to surrender the premises to Southaven. The Sixth Circuit, applying the factors outlined above, held that Southaven was not a proper antitrust plaintiff.

This Court, applying these factors to this case, finds the Counties are not the proper antitrust plaintiffs. The first three factors discuss the nature of a plaintiff's injuries. As discussed above, the Court holds that plaintiffs have alleged no injury whatsoever, therefore, the first three factors militate against a finding of standing. The fourth factor is whether there is the potential for duplicative recovery. Without needing to decide, the Court notes that the municipalities involved, the citizens of the Counties, and competitor sludge disposal companies might be able to recover for the alleged antitrust violations. Thus, the potential exists. Last, as to the fifth factor, the municipalities, which pay the allegedly inflated amounts which the Counties merely collect, are the direct victims of the alleged violation. The cost is charged directly to them and the Counties merely collect the sums. Application of the *Southaven* factors, then, further supports this Court's finding of a lack of standing on behalf of the Counties.

RICO Counts

RICO provides remedies to anyone "injured in his business or property by reason of a violation of section 1962". 18 U.S.C. § 1964(c). For the reasons stated above, the Court holds that plaintiffs do not have standing to sue. They have not been injured by any of the defendants' alleged activities. As held in *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984), "[s]ince Oakland County is a mere conduit for sewer charges owed to the City of Detroit the failure of any of the municipalities . . . to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal than was assumed and planned for". *Id.* at 296. Thus, it is the municipalities who are injured by the inflated prices and, if they do not pay the higher prices, then the City of Detroit takes the loss. Thus, the Counties are acting solely as collectors of these sums and are not injured.

Breach of Fiduciary Duty

Plaintiffs have sued Coleman A. Young for breach of his fiduciary duty as court-appointed Administrator of the DWWTP. Again, plaintiffs allege in paragraph 92 of their respective complaints that their injuries are the unconscionably inflated prices paid for the treatment and disposal of sewage. For the reasons set forth above, the Court holds that the Counties are not injured and, therefore, plaintiffs' counts for breach of fiduciary duty should be dismissed.

An appropriate order will be entered.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

Civ. A. No. 84-1068

COUNTY OF OAKLAND, by George W. Kuhn,
the Oakland County Drain Commissioner,
Plaintiff,

and

COUNTY OF MACOMB, by Thomas S. Welsh,
the Macomb County Public Works Commissioner,
Intervening Plaintiff,

v.

THE CITY OF DETROIT, COLEMAN A. YOUNG,
CHARLES BECKHAM, NANCY ALLEVATO,
as Personal Representative for the ESTATE OF
MICHAEL FERRANTINO, DARRALYN BOWERS,
SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON,
WALTER TOMYN, VISTA DISPOSAL INC.,
MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC.,
WOLVERINE DISPOSAL, INC.,
and WOLVERINE DISPOSAL-DETROIT, INC.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO
DISMISS ALL COUNTS OF THE COMPLAINT

For the reasons set forth in the Memorandum Opinion bearing this date,

IT IS HEREBY ORDERED that Defendants' Motions to Dismiss all Counts of the Complaint are **GRANTED**.

/s/
Richard F. Suhrheinrich
United States District Judge

Dated: October 31, 1985

APPENDIX D

UNITED STATES DISTRICT COURT,
E.D. MICHIGAN, S.D.

Civ. A. No. 84-1068

COUNTY OF OAKLAND, by George W. Kuhn,
the Oakland County Drain Commissioner,
Plaintiff,

and

COUNTY OF MACOMB, by Thomas S. Welsh,
the Macomb County Public Works Commissioner,
Intervening Plaintiff,

v.

The CITY OF DETROIT, COLEMAN A. YOUNG,
CHARLES BECKHAM, NANCY ALLEVATO,
as Personal Representative for the ESTATE OF
MICHAEL FERRANTINO, DARRALYN BOWERS,
SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON,
WALTER TOMYN, VISTA DISPOSAL INC.,
MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC.,
WOLVERINE DISPOSAL, INC.,
and WOLVERINE DISPOSAL-DETROIT INC.,
Defendants.

Feb. 5, 1986

MEMORANDUM OPINION

SUHRHEINRICH, District Judge.

On October 31, 1985, this Court granted summary judgment for defendants in this matter, finding that Oakland and Macomb Counties were not the proper parties to bring suit, 620 F.Supp. 1399. The Counties, pursuant to Fed.R.Civ.P. 59(e), have moved to alter this judgment. The Counties maintain that this Court misunderstood the relationships at issue in this case, and that these relationships confirm their standing to sue. To the contrary, the Counties' briefs, which discuss these relationships, merely serve to confirm that the Court did understand the relationships and that its granting of summary judgment was proper.

Macomb County adopts the brief of Oakland County in this motion. However, it is unclear whether the relationships between the relevant parties are identical in the two Counties. For purposes of this motion, the Court will consider that they are.

The relevant relationships, as described by the Counties, are as follows. The Counties contract with Detroit for sewage disposal. The Counties, by statute, own, operate, and administer the sewer systems that connect the sewer systems to Detroit's interceptors. The Counties determine the cost of maintaining the interceptor system, add that cost to the Detroit charges, and then bill the municipalities. The Counties then collect the aggregate fees charged to the municipalities and then pay Detroit from the specific, segregated sewer Funds maintained by the County for each of the three County sewer Districts. It is these Funds that the County seeks to protect by this suit. Similarly, the fees charged the municipalities by the County are paid by the municipalities from their own segregated sewer funds supported exclusively by user fees.

The conclusion that plaintiffs wish to draw from these facts is that the Funds are directly and adversely impacted by the illegal overcharges described in their complaint. These funds, plaintiffs argue, are the ultimately injured entities. The Court disagrees. The Court appreciates and understands the statutorily mandated, active role which the Counties play in the administration of the metropolitan sewer system. However, this alone is not evidence of injury.

The Counties have misconstrued the cause and effect of any dissipation of the Funds which they maintain. The plaintiffs determine

the cost of maintaining their interceptor systems, add this to the charges of the City of Detroit, and send an aggregate bill to the municipalities. Any dissipation of the Funds is caused by the failure of the municipalities to pay their contractual obligations to the Counties. The Funds are not injured by the upstream actions of defendants herein; rather, they are injured by the downstream actions of the municipalities and end users. Perhaps a more proper cause of action, if the goal is to replete the Funds, would be a contractual one against the municipalities.

Another concern of this Court, as discussed in its first memorandum opinion, is that of duplicative recovery. The municipalities operate in the same manner as the Counties, i.e., they maintain segregated funds. If the situation were as plaintiffs posit, the municipalities' funds would similarly be dissipated. Thus, under plaintiffs' scheme, the municipalities could maintain a concurrent cause of action. Further, the end users' "funds" would likewise be dissipated. They, too, could presumably maintain an action. Thus, there is great potential for duplicative recovery.

The fact is that the end users, because they have no one to whom they can pass on their costs, are the ultimately injured party. The plaintiffs and municipalities are really no more than conduits between Detroit and the end users. It is the end users who must pay any alleged overcharges.

The plaintiffs argue that permitting them, rather than the municipalities or the end users, to bring suit will avoid the problems identified in *Hanover Shoe* and *Illinois Brick*. First, the Counties contend that it is easier for them to trace the alleged overcharges. However, the simple ability to trace the overcharges does not establish the crucial element—injury. Further, the records are just as available to the municipalities and, perhaps, to the end users, which would permit them to trace their overcharges. Second, plaintiffs contend that the individual end users do not have the same incentive, expertise, and resources to bring this action. However, the Supreme Court has, in a similar case, held just the opposite. In *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266, 92 S.Ct. 885, 893, 31 L.Ed.2d 184 (1972), the Court stated:

> Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the

> amount in controversy. 28 U.S.C. § 1337; 15 U.S.C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. . . . The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.

This type of action, then, would install the actually injured parties as plaintiffs, would avoid duplicative recovery, eliminate tracing problems, and provide sufficient resources to maintain suit.

The Counties then argue that, in a sense, they are suing on behalf of the end users, who will benefit by plaintiffs' recovery. The Court has four responses. First, this argument is inconsistent with plaintiffs' contention that it is not a mere conduit for the municipalities and end users. Second, plaintiffs have maintained throughout the proceedings that they are not suing on behalf of the end users (*see* Memorandum on Behalf of Oakland County in Opposition to the Motions to Dismiss Antitrust Counts, p. 6, fn. 1). Third, Congress has established that only a state, acting through its attorney general, may sue as *parens patriae* of its citizens. 15 U.S.C. § 15c(a)(1) (Supp. 1983). Fourth, and most importantly, plaintiffs show no reason, and the Court sees no reason, why the end users would benefit by recovery by the Funds.

Oakland County then tries to argue that it itself is an end user of the sewage services and has standing to sue in that capacity. Paragraph 18 of the affidavit of Robert H. Fredericks II establishes that "Wastes from County buildings are discharged into municipal systems which are part of the three Districts. Oakland County pays the respective municipalities for their services just as any other user". The Court agrees that Oakland County would have standing to sue in this capacity. However, there are two problems. First, a fair reading of the Complaint shows that the Counties were not suing in this capacity, but were suing as administrators of the sewage system Funds. Second, if such an action were to be brought, the Counties would be limited to treble damages only for the alleged overcharges attributable to them as end users.

The Counties, in their motions to alter judgment, renew their argument that their "injuries" are redressable under *Hanover Shoe* and *Illinois Brick*. The Court adequately addressed this argument in its first opinion. To the extent new arguments are raised by plaintiffs, however, it will do so again.

Plaintiffs initially argued that the "pass-on" defense was inapplicable here. Now plaintiffs contend that there is no "pass-on" because, in effect, there is no resale. This is because the Counties, the municipalities, and the end users are really one party contracting with the City of Detroit. The absurdity of this argument is shown by *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984), where the County sued Berkley to recover unpaid sewage funds. If, indeed, the parties are really one and there is no resale, why would Oakland bring suit to recover Berkley's contractual obligations? Further, *Berkley* established that if a municipality does not pay its share, either the other municipalities or the City of Detroit, and not the Counties, pick up the slack. Thus, the plaintiffs' argument that they are one with the municipalities and end users fails. Also, it is inconsistent with the Counties' argument that they are not mere conduits.

Plaintiffs further argue that this case is identical to *Illinois Brick* and *Hanover Shoe* and that the "pass-on" defense should not apply for this reason. However, as this Court has previously pointed out, this case differs in two important respects. First, the fundamental reason for not allowing the "pass-on" defense is that the direct purchaser is injured even where he can "pass on" overcharges to an indirect purchaser. This is because he is "passing on" the overcharges at inflated prices, which, when supply and demand interact, reduces the demand for his product. Here, because plaintiffs are monopolies, supply and demand to not interact. Thus, they are uninjured by the alleged overcharges.

Second, the "cost plus" exception, as discussed in *Obron v. Union Camp Corporation*, 355 F. Supp. 902, 907 (E.D. Mich. 1972), *aff'd*, 477 F.2d 542 (6th Cir. 1973), is applicable here where it was not in *Hanover Shoe* and *Illinois Brick*. Here, the Counties take the cost of the Detroit charges, add that to the cost of maintaining their systems, and bill the municipalities. In essence, this is a pre-existing "cost plus cost" contract. The Counties have no incentive to absorb any overcharges. Thus, the Counties suffer no injury and lack stand-

ing. This is exactly the situation where the exception to *Hanover Shoe* and *Illinois Brick* for cost plus contracts should apply. In essence, plaintiffs are not initially injured and, thus, have no injury to "pass on". They simply serve as an intermediary between the municipalities and Detroit. Plaintiffs are not initially injured by any overcharges because it is not their obligation to pay them. They simply act as bill collectors for the City of Detroit. Thus, either the municipalities or end users who must pay the bills or Detroit itself (which absorbs the charges when unpaid) are injured.

The cases cited by plaintiffs in support of their argument that the "pass-on" defense should not apply are easily distinguishable. In *City of Cleveland v. Cleveland Elec. Illum. Co.*, 538 F.Supp. 1320 (N.D. Ohio 1980), plaintiff, a City municipal utility that purchased electricity from defendant and sold it to citizens, was held to have standing to sue. The critical difference between that case and this case is that there, as that Court noted, the plaintiff City of Cleveland had an incentive to absorb part of the overcharge: its need to attract customers. *Id.* at 1324-25. Here, however, there is no such incentive because plaintiffs have monopolies. Thus, if they pass on inflated prices, they need not worry about losing business to other customers. Similarly, *Jewish Hospital Ass'n v. Stewart Mechan. Enterprises, Inc.*, 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 450 U.S. 966, 101 S.Ct. 1483, 67 L.Ed.2d 615 (1981), was a case where, unlike here, the plaintiff had ~~an in~~centive to absorb the overcharge. *Id.* at 975-77. In sum, the Court agrees that *Hanover Shoe* and *Illinois Brick* favor antitrust suits by the direct purchasers. However, this is a situation where such a presumption does not apply.

Plaintiffs' argument that *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), authorizes a suit such as this (at p. 4 of Oakland's Reply Memorandum in Support of Motion to Alter Judgment) seriously misconstrues that case. *Hawaii* simply holds that § 4 of the Clayton Act authorizes a state to sue either in its proprietary capacity as a consumer in the marketplace or for injury to its general economy, but not both. *Id.* at 262-3, 92 S.Ct. at 891-92.

As discussed earlier in this opinion, plaintiffs are not suing in their proprietary capacity as consumers in the marketplace. If they were, their damages would be limited to the overcharge attributable

to them as end users. Rather, plaintiffs are suing as administrators of the sewage system.

Further, plaintiffs are not suing for injury to their general economy. Plaintiffs have always maintained that they are not suing on behalf of their citizens and such *parens patriae* suits are limited to the states.

The Court must also clear up another misconception. Plaintiffs seem to be of the opinion that this Court found the municipalities were the proper party to bring suit. The issue of the municipalities' standing is not now, and has never been, before this Court. The Court has discussed the potential standing of other entities to show potential for duplicative recovery and to help show why the Counties do not have standing. It would be improper for the Court to rule on the standing of any party not before it. The Court also notes that Macomb County's request for the substitution of the municipalities for the counties pursuant to Fed.R.Civ.P. 17(a) is an improper use of that rule.

The Court also wishes to reiterate its discussion of *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983) where the court found the following factors relevant to determining antitrust standing:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused;
>
> (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;
>
> (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative;
>
> (4) the potential for duplicative recovery or complex apportionment of damages; and
>
> (5) the existence of more direct victims of the alleged antitrust violation.

Relating these factors to the case at bar, it is clear that plaintiffs do not have standing:

> (1) The cause of any harm to the plaintiff is the failure of the municipalities to replenish the funds. There is no allegation that any harm was intentional;

(2) Plaintiffs are not competitors in the relevant market. They are consumers only to the very limited extent of the fees they pay for end use;

(3) Any injury plaintiffs may suffer is indirect through the inability of the municipalities to pay their bills;

(4) There is great potential for duplicative recovery; and

(5) The municipalities and end users are more direct victims of any antitrust violations.

The Court wants to emphasize that it makes no finding whatsoever as to the existence of an antitrust violation. Further, the Court does not deny that the Counties play a very significant role in the administration of the metropolitan sewage system. However, plaintiffs have been unable to allege the existence of an antitrust injury. In a matter that involves the potential recovery of a substantial amount of damages, the Court feels that the party bringing suit, and potentially recovering, must be one injured by the alleged violations.

RICO Claims

Plaintiffs also move to alter this Court's dismissal of their claims under RICO. The Court granted dismissal because plaintiffs did not allege the prerequisite of injury to have standing. RICO, and the issue of standing have recently been addressed by the Supreme Court. In *Sedima, S.P.R.L. v. Imex Co.*,___ U.S. ___, 105 S.Ct. 3275, 3286, 87 L.Ed.2d 346 (1985), the Court held:

> . . . plaintiff only has standing if, and can recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.

There exists the requirement under RICO, as under the antitrust acts, that the plaintiff must suffer an injury by defendants' actions before it has standing to sue. Here, as discussed above and in the Court's original Memorandum Opinion, plaintiff simply has not been injured by defendants' conduct. Any injury the Counties suffer is a result of the municipalities not fulfilling their contractual obligations. Further, the relationships between the parties, as described in *Berkley* and by plaintiffs, establishes that any failure to pay by a municipality will result in the other municipalities or the City of Detroit picking up the slack. Thus, the Court does not find any possibility of injury to the Counties by defendants' conduct.

Terre Du Lac Assoc., Inc. v. Terre Du Lac, 772 F.2d 467 (8th Cir. 1985) does not change this result. In *Terre Du Lac*, plaintiff was a property owners' association complaining about the costs of failing to maintain roads in a subdivision. The Court held that, in that case, plaintiff did not lack standing merely because it may pass its injuries on to its members. Certainly, the Court did not abandon the constitutional requirement of an injury in fact.

Further, *Terre Du Lac* is distinguishable. In that case, the Association suffered an injury and then passed the injury along to its members. Here, the Counties do not suffer any injury which can be passed along to the municipalities. Rather, the Counties serve as mere bill collectors for the City of Detroit. If they are unable to collect, the Counties do not suffer. Rather, any injuries resulting from defendants' conduct, either directly or indirectly, is borne by the municipalities and/or end users. Thus, the Counties suffer no injury which can be passed along.

An appropriate order, in accordance with this Memorandum Opinion, will be entered.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT,
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

Civ. A. No. 84-1068.

COUNTY OF OAKLAND, by George W. Kuhn,
the Oakland County Drain Commissioner,
Plaintiff,

and

COUNTY OF MACOMB, by Thomas S. Welsh,
the Macomb County Public Works Commissioner,
Intervening Plaintiff,

v.

The CITY OF DETROIT, COLEMAN A. YOUNG,
CHARLES BECKHAM, NANCY ALLEVATO,
as Personal Representative for the ESTATE OF
MICHAEL FERRANTINO, DARRALYN BOWERS,
SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON,
WALTER TOMYN, VISTA DISPOSAL, INC.,
MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC.,
WOLVERINE DISPOSAL, INC.,
and WOLVERINE DISPOSAL-DETROIT, INC.,
Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO ALTER JUDGMENT

In accordance with the Memorandum Opinion bearing this date,

IT IS HEREBY ORDERED that plaintiff's motion to alter judgment is **DENIED**.

/s/
Richard F. Suhrheinrich
United States District Judge

Dated: February 5, 1986

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOT RECOMMENDED
FOR PUBLICATION

No. 86-1809

STATE OF MICHIGAN, DEPARTMENT OF TREASURY, REVENUE DIVISION,
Plaintiff-Appellant,

v.

JERRY FAWAZ d/b/a WEST SEVEN MILE SERVICE AND FROGGY'S FILL-UP, INC.,
Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

Decided and Filed: May 9, 1988

BEFORE: MARTIN, MILBURN, and **NORRIS**, Circuit Judges.

ALAN E. NORRIS, Circuit Judge. The State of Michigan appeals from an order of the district court granting the motion of defendant Jerry Fawaz to dismiss the complaint for failure to state a claim upon which relief can be granted. *See Michigan Dep't of Treasury v. Fawaz*, 653 F. Supp. 141 (E.D. Mich. 1986). The complaint was based upon 18 U.S.C. § 1964(c), the treble damages private civil remedy section of the Racketeer Influenced and Corrupt Organizations Act (RICO).

According to the complaint, during calendar year 1982, Fawaz, who operated a number of gasoline stations, mailed to the state monthly sales tax returns which underreported his gross income by $6,000,000, with the result that he underpaid his sales tax liability by $240,000. The state sought treble damages of $720,000.

Prior to the filing of this case, Fawaz was convicted in state court of failing to pay these same taxes and, as part of the court's sentencing order, was fined, placed on probation, and ordered to make restitution to the state of the unpaid taxes, plus interest, at the rate of at least $5,000 per month. It is conceded that Fawaz has been abiding by this restitution order.

When a person associated with an enterprise engaged in interstate commerce conducts the enterprise's affairs through a pattern of racketeering activity, 18 U.S.C. § 1962 is violated. The state argued that the gasoline stations constituted an enterprise as defined in 18 U.S.C. § 1961(4); that the mailing of false tax returns constituted mail fraud, which is listed as a racketeering activity in 18 U.S.C. § 1961(1); and that the repeated mailings over the one-year period amounted to a pattern of racketeering activity. Under 18 U.S.C. § 1964(c), a person who is injured in his business or property by a violation of 18 U.S.C. § 1962 may recover treble damages. The state contended that, within the contemplation of the statute, it was a "person" who had been "injured" by Fawaz's failure to pay sales taxes.

We are unable to agree with the district court's conclusion that the state was not a "person" who could bring the action,

that it lacked standing. In view of repeated admonitions by the Supreme Court to liberally construe the civil remedies portions of RICO (*see, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-99 (1985)), we are unable to say that a state is not a "entity capable of holding a legal or beneficial interest in property" and thus not a "person" within the contemplation of RICO. 18 U.S.C. § 1961(3). *See also Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 314 (7th Cir. 1985); *Alcorn County v. U.S. Interstate Supplies*, 731 F.2d 1160, 1169 (5th Cir. 1984).

Fawaz argued in the district court that the state should not be permitted to proceed against him civilly for treble damages since it already enjoyed an order of restitution and therefore could not demonstrate an injury in fact. Certainly, had the state proceeded against Fawaz in state court and obtained a judgment in the amount of unpaid taxes, it would be precluded from proceeding against him in federal court for treble damages since it would have elected and pursued to judgment another remedy. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984); *St. Paul Fire & Marine Ins. Co. v. Michigan Nat'l Bank*, 660 F.2d 196, 199 (6th Cir. 1981); *Rutter v. King*, 57 Mich. App. 152, 226 N.W.2d 79 (1974). Although the order of restitution may not have the same preclusive effect as a judgment for purposes of considering the effect of an election of remedies, nevertheless, it would have a bearing on the state's ability to demonstrate that it has suffered an injury cognizable under RICO, especially if the order is complied with. However, we conclude that the district court's order must be affirmed for a more fundamental reason.

By enacting the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, Congress took aim at racketeering activity, providing criminal sanctions against those engaged in racketeering and affording those injured by that activity a private civil action to recover treble damages. *Sedima*, 473 U.S. at 481-83. The legislative history of the Act clearly demonstrates that, in enacting RICO, Congress intended to provide new weapons for an assault upon organized crime and its economic roots; to seek eradication of organized crime in the United States; to deal with criminals whose access to an

economic base constitutes a serious threat to the economic well-being of the nation; to remove the corrupting influence of organized crime from the channels of commerce; and to deprive organized crime of its economic power by depriving it of its huge, illegal profits. *Russello v. United States*, 464 U.S. 16, 26-28 (1983).

Nothing of that sort was involved in this case. Fawaz repeatedly cheated on the sales taxes he owed the State of Michigan. The state's attorney general argues that Fawaz's conduct can be dissected and shoe-horned into the Act's component definitions so that, when reconstituted, his conduct amounts to racketeering activity and RICO applies. But, simply because a party, through hypertechnical parsing of a statute, points out that the statute conceivably applies to the facts of a case, does not require us to apply that statute where, to do so, would violate the clear intent of Congress. Under the circumstances of this case, for us to engage in such a tortured exercise of statutory construction would demean the intent of those in Congress who sought to address the serious threat posed to the country's economy by organized crime.

Because the State of Michigan has already brought Fawaz to account for his criminal conduct, it appears that the attorney general is asking us to designate the district courts as collection agencies for unpaid state taxes, presumably because he can there pursue treble damages. This, in the interest of comity, we dare not permit. If the attorney general wishes to avail himself of a civil remedy not now prescribed by state law when collecting unpaid state taxes, his desire should be brought to the attention of Michigan's legislature.

The attorney general relies upon the opinion in *Illinois Dep't of Revenue v. Phillips*, 771 F.2d at 317, where the court of appeals, although expressing "doubts about the application of RICO" to circumstances quite similar to those in this case, nevertheless, could not "say that it does not come within the framework of the statute," and thus permitted the State of Illinois to pursue treble damages. In that case, it appears that the state's initial action against the defendant taxpayer was taken in the district court under RICO, whereas, in this case,

the state initially proceeded against the taxpayer in the state criminal proceeding. Because our "doubts" have ripened into a conviction that RICO does not apply to the circumstances of this case, we are not persuaded to adopt the reasoning of that opinion.

Accordingly, the judgement of the district court is **affirmed**.

ISSUED AS MANDATE: August 30, 1988

COSTS: NONE

APPENDIX G

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Const. art. III, § 2[1]

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

15 U.S.C. § 15(a) (Supp. 1989)

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

18 U.S.C. § 1964(c) (1984)

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.